20

# CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

# COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

FROM NOVEMBER 7, 1893, TO JANUARY 8, 1894.

---

REPORTED BY
DAVID GOLDSMITH, of the St. Louis Bar
AND
BEN ELI GUTHRIE, of the Macon City Bar,
OFFICIAL REPORTERS.

## VOL. LV.

COLUMBIA, MO.
E. W. STEPHENS, PUBLISHER.
1894.

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## JUDGES OF THE

# ST. LOUIS COURT OF APPEALS.

---

HON. RODERICK E. ROMBAUER, *Presiding Judge.*

HON. WILLIAM H. BIGGS, } *Judges.*
HON. HENRY W. BOND, }

JOHN LEWIS, *Clerk.*
DAVID GOLDSMITH, *Reporter.*

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## JUDGES OF THE

# KANSAS CITY COURT OF APPEALS.

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HON. JACKSON L. SMITH, *Presiding Judge.*

HON. JAMES ELLISON, } *Judges.*
HON. T. A. GILL, }

L. F. McCOY, *Clerk.*
BEN ELI GUTHRIE, *Reporter.*

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# CASES DETERMINED

BY THE

## ST. LOUIS AND THE KANSAS CITY

# COURTS OF APPEALS.

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### OCTOBER TERM, 1893.

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ROBERT NICHOLS, Appellant, v. VALLE REYBURN, Administrator *de bonis non* of the estate of JOSEPH BREWSTER, Respondent.

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**St. Louis Court of Appeals, November 7, 1893.**

1. **Administration:** COMPENSATION FOR LEGAL SERVICES RENDERED TO THE ADMINISTRATOR: DIRECT LIABILITY OF ESTATE. An attorney, who renders legal services for the benefit of the estate of an intestate at the instance of the administrator, is entitled to have his claim for reasonable compensation therefor allowed against and paid directly out of the assets of the estate.

2. ——— : ——— : ORIGINAL JURISDICTION OF CIRCUIT COURT IN ESTABLISHMENT OF CLAIM. A circuit court has original jurisdiction of an action by an attorney for the establishment of such a claim directly against such estate.

*Appeal from the St. Louis City Circuit Court.*—HON. JAMES E. WITHROW, Judge.

REVERSED AND REMANDED (*Bond, J., dissenting.*)

*R. M. Nichols*, for appellant.

(1) Section 92, of the Revised Statutes of 1889, provides that the administrator shall "defend all suits brought against him;" and section 222 provides that



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"the court shall allow all reasonable charges for legal advice and services." Had the administrator paid this expense of administration, it would have been allowed him as "costs." 2 Woerner on Administration, sections 514 and 515; *Gamble v. Gibson*, 59 Mo. 585. The right to an allowance of an attorney's fee, as costs, is given or created by sections 92 and 222, and it has been held that, when given by the statute, the same can be assessed. *City of St. Louis v Meintz*, 107 Mo. 615. (2) The circuit court has jurisdiction to allow and direct the payment by the administrator *de bonis non* out of the funds in his hands belonging to the estate of Joseph Brewster, deceased, counsel fees as costs and expenses incurred, but not paid, by the prior administrator. *Ziegenhein v. Tittman*, 103 Mo. 557; *Powell v. Powell*, 23 Mo. App. 368; *Long v. Redmann*, 58 Ind. 62; *Scott v. Dailey*, 89 Ind. 477; *Thompson v. Smith*, 64 N. H. 412; *In re Couts*, 87 Cal. 480; *Pennie v. Roach*, 94 Cal. 515; *Portis v. Cole*, 11 Tex. 158. (3) Equity should entertain jurisdiction, for if appellant is compelled to prove up his claim against the estate of Jeptha H. Simpson, his administrator would be put to an action against the estate of Joseph Brewster, where in this action the claim can be laid against the estate from which it is justly due and the multiplicity of suits prevented. *Biddle v. Ramsey*, 52 Mo. 153; *Primm v. Raboteau*, 56 Mo. 414. (4) The petition shows that the expenses were incurred by the administrator in defending a suit, brought against him as such for the purpose of ascertaining who is entitled to the fund in his hands subject to distribution. It is the duty of the administrator to ascertain to whom he should pay out the fund as distributee under the law. *Kingsland v. Scudder*, 36 N. J. Eq. 286; *In the Matter of the Estate of McCune*, 76 Mo. 205; *Johnson v. Halifield*, 82 Ala. 123; *In re Simmons Will*, 55 Ky. 239.

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*Robert H. Kern*, for respondent.

Rombauer, P. J.—The plaintiff's petition states in substance the following facts: One Jeptha Simpson was appointed administrator of Joseph Brewster's estate and served as such from October 12, 1886, the date of his qualification, until February 23, 1893, the date of his death. While Simpson was acting as such administrator, he employed the plaintiff, who is an attorney at law, to advise him in the matters of his administration and to defend him in all matters pertaining to the estate, and particularly in a suit brought by Ida May Healy and others, wherein the claimants sought to establish that they were the sole distributees of said estate by virtue of a deed of adoption claimed to have been executed by Brewster. The plaintiff as such attorney in the matters aforesaid performed services of the reasonable value of $2,000, and expended $23.25 in cash, neither of which were paid for by said Simpson. After Simpson's death the defendant was appointed administrator *de bonis non* of Brewster's estate, and as such became possessed of the remaining assets of the estate, valued at $9,000. The plaintiff prays that the sum of $2,023.25 may be ordered by the court to be paid to him by the defendant out of the funds in his hands belonging to the estate of Joseph Brewster. The petition further states that the services were performed "for the benefit of the funds and of the parties interested in the estate of Brewster."

To this petetion the defendant interposed a general demurrer, which the court sustained. The plaintiff declining to plead further, judgment was entered against him on a demurrer, and he brings the case by appeal to this court.

It will be thus seen three points are presented for our decision. *First.* Can an attorney at law, who

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makes a contract with an administrator to defend him in his trust relation, prosecute his claim for the services rendered in pursuance of such contract directly against the estate represented by such administrator. *Second.* Can he prosecute such claim against the estate for services rendered in determining by legal proceedings who are the proper distributees of the estate, provided it further appears that the services were rendered in the interest of the true distributees, and in the defense of an action which the administrator was bound to defend in the courts of administration. *Third.* If he can do so, has the circuit court original jurisdiction of such an action?

Neither of these questions is free from difficulty either on principle or authority, and we will discuss them in the order above presented.

On principle the proper answer to the first question must depend upon the character of the contract which the attorney makes in these cases. The administrator is a mere agent for the estate. The general rule is that, where an agent contracts for a disclosed principal, and acts within the scope of his authority, the principal, and not the agent, is liable upon the contract. To this rule, however, there are many exceptions, one of which is recognized in *Hovey v. Pitcher*, 13 Mo. 192, namely, that where the credit is given to the agent, the agent may personally be sued. Section 92 of the Revised Statutes of 1889 makes it the duty of the administrator to defend all actions brought against him, the defense whereof is necessary in the course of administration. Section 222 provides that the court shall allow the administrator, in his settlements, reasonable charges for legal advice and services. It was decided as early as *Gamble v. Gibson*, 59 Mo. 585, that an executor could subject the estate to a charge for necessary legal services rendered to the estate at his request by another.

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Such claims are expenses of administration, and, if reasonable, must be allowed by the court against the estate as diminishing the assets of the estate in the hands of its statutory trustee to that extent.

Such being the law, we hold that an attorney in contracting for professional services with an administrator, *prima facie*, contracts on the credit of both the agent and principal. The agent becomes responsible to him to the extent of the contract which he makes, without regard as to whether it is reasonable or not, or for the benefit of the estate or not; the estate becomes responsible to him for his reasonable charges for services rendered, which are for its benefit.

In carrying out this proposition to its logical results, it was held, and we think properly so, in *Long v. Rodman*, 58 Ind. 62, that as by statutory provision the reasonable fees of an attorney, employed by an executor or administrator in the management of the decedent's estate, are made a proper charge against the estate, the attorney may, in the event of the non-payment of his fees, waive his personal claim against the executor or administrator, and apply directly to the proper court for the allowance and payment thereof out of the estate. The action in that case was instituted in the circuit court. In the same line is *Powell v. Powell*, 23 Mo. App. 368, in which it was held that under sections 100 and 101 of the Revised Statutes, which provide for the allowance of expenses incurred by the administrator for labor in preserving stock and other perishable property left by the deceased and requiring immediate care, the person furnishing the labor under a contract with the administrator may proceed directly against the estate. In rendering the decision Judge Phillips said: "It would, in my opinion, be sticking in the bark to say the claim can only be allowed as a credit to the administrator, instead of

allowing it in favor of the meritorious party whom the statute authorized the administrator to employ." This language was quoted with approval by the supreme court in *State ex rel. Ziegenhein v. Tittmann* 103 Mo. 553, 565. We hold, therefore, that both on principle and authority the first question above put should be answered in the affirmative. While the exact point arising for decision is one of first impression in this state, the case of *Powell v. Powell, supra,* furnishes authority by analogy for such holding.

Passing to the consideration of the second question, we conclude that under the general allegations of the petition, which the demurrer admits to be true, it must likewise be answered in the affirmative. The true inquiry in all such cases is, have the services been performed in the interest of the estate. We are referred by respondent to *Bates v. Ryberg,* 40 Cal. 463, where it was held that an administrator can not appeal from an order of final distribution on the ground that the estate was improperly divided between the legatees; also to *Shaw v. Moderwell,* 104 Ill. 64, where it was decided that an executor can claim no allowance for defending a will which is defeated upon the trial of its validity; and to *Mumper's Appeal,* 3 Watts and S. 441, where it was held that the executor is not entitled to attorney's fees upon the trial of the validity of the will *upon appeal,* although the will be upheld. All these cases, however, furnish no authority for the upholding of the demurrer in this case. The petition here states in general terms that the services were performed in advising the administrator in the matters of his administration, and, while it emphasizes particular services, it alleges that all the services were performed for the benefit of the funds and of the parties interested in the estate.

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In this state the administrator is a statutory trustee "to the end that the property of the estate may be collected, preserved and disposed of according to law." *Smarr v. McMaster, Adm'r*, 35 Mo. 349, 351. If he is sued touching assets of the estate, it is his duty to defend. Whether such duty ceases after all the beneficiaries of the estate are brought in and are before the court does not rise for decision now, as that question is one which affects the claimant's measure of damages in this case and not his right of recovery, and it is only the latter which can be reached by a general demurrer to his petition. We may state generally, however, that in this case as in all others the powers of the officer are commensurate with his duties.

This brings us to the third question, namely, whether the plaintiff has selected the proper forum for the adjudication of his claim. Section 190 of the Revised Statutes provides that "any person having a demand against an estate may establish the same by the judgment or decree of some court of record." In the view we take, and which was taken by the Kansas City court of appeals in the analogous case of *Powell v. Powell, supra*, the plaintiff's claim is a demand against the estate. There is nothing in the section above recited, which would limit its operation to such demands as arose in the lifetime of the decedent. The administration of Simpson has ceased with his death, and the probate court could not allow the claim as a credit in Simpson's settlements, all the less so since there are well-considered cases holding that such expenses can be allowed to an administrator only after they have been actually paid by him. *Bates v. Vary*, 40 Ala. 421, 441; *Thacher v. Dunham*, 5 Gray, 26. Nor could the probate court allow the claim in the settlements of the present administrator, because the expenses were not incurred by him. Nor, it would

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seems could the probate court allow them on an independent suit brought in that court by the plaintiff. The very fact that all demands exhibited in the probate court must be classified, and that the statute makes no provision for the classification of such a claim, seems to preclude the idea of a suit by the claimant in the probate court. Besides that, probate courts are courts of statutory jurisdiction, and have such powers only as the statute confers upon them either directly or as are necessarily incident to the proper exercise of duties directly imposed. *Ford v. Talmage*, 36 Mo. App. 71, and cases cited.

To hold that the plaintiff's only remedy is to have his claim allowed against Simpson's estate, and then have Simpson's administrator present it for allowance against the estate of Brewster, would be a denial of any adequate remedy to the plaintiff. The administrator of Simpson could not pay the claim until the expiration of two years, and not then unless the assets of the of the estate were sufficient to pay all demands; nor could he exhibit the claim to the present administrator of Brewster's estate for allowance, according to the authorities above cited, until he had first paid it himself.

We recite the foregoing additional considerations, sustaining the jurisdiction of the circuit court, merely to show the inconvenience of any other holding. If this is a claim against the estate, as it purports to be, the jurisdiction of the circuit court can be upheld by the language of the statute without any other aid.

We do not intend to decide that, in case it should turn out, upon the trial of the cause, that the statutory distributees attended to the defense of their own interests, either *ab initio* or at subsequent stage of proceedings, such showing might not defeat the recovery of the claimant on that account altogether, or materially

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reduce his damages, as the case may be; nor do we intend to decide that the burden is not upon the plaintiff to show that the services were performed in the interest of the estate. We simply decide that, the allegations of the petition, which include these services and *others*, being sufficiently comprehensive to justify some recovery, we cannot uphold a general demurrer thereto.

The judgment is reversed and the cause remanded. Judge BIGGS concurs. Judge BOND dissents.

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EDWARD SKINNER, Respondent, v. PHILIP STIFEL, *et al.*, Appellants.

**St. Louis Court of Appeals, November 7, 1893.**

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1. **Contributory Negligence:** LAW AND FACT. The evidence in this cause is considered, and held not to conclusively establish contributory negligence on the part of the plaintiff in failing to observe an excavation in a public highway.

2. **Instruction Given Orally and in Absence of Counsel.** It is error for the trial court, after the submission of a cause to the jury, to give to them an additional instruction orally or in the absence of counsel whose attendance can be procured.

3. ———: COMMENTING ON CHARACTER OF THE CAUSE. It is prejudicial error for the court in an instruction to the jury to state that it considers the cause a very simple one both as to the law and the facts, and to urge the jury to come to some agreement owing to the small amount of money involved.

4. **Negligence:** VIOLATION OF MUNICIPAL ORDINANCE. *Held,* in the course of discussion, that the violation of a municipal ordinance, requiring persons making excavations on public highways to display danger signals over such excavations, is negligence, *per se.*

*Appeal from the St. Louis City Circuit.*—HON. JACOB KLEIN, Judge.

REVERSED AND REMANDED.

*Laughlin, Wood & Tansey,* for appellants.

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*Julian Laughlin*, for respondent.

(1) The question of contributory negligence was submitted to the jury, and a finding had for plaintiff. (2) On the question of the verbal instruction of the court to the jury, there was nothing improper said, or that in any way injuriously affected defendants. *Fairgrieve v. Moberly*, 29 Mo. App. 141; *McPherson v. Railroad*, 97 Mo. 254; *Allen v. Woodson*, 50 Ga. 53; *Pierce v. Rehfuss*, 53 Mich. 66.

ROMBAUER, P. J.—The plaintiff recovered a judgment for $21.35 against the defendants for injuries to his vehicle and loss of time, alleged to have been caused by the defendants' negligence in failing to place a red light, in the night time, on an excavation made by them in a street of the city of St. Louis, as required by the ordinances of the city.

The defendants appeal, and assign for error that the court refused to sustain their demurrer to the evidence, and that the court further erred in giving to the jury in their absence and in absence of their counsel an oral instruction, the tenor of which was prejudicial to them.

The plaintiff, who is a hack driver, testified that on the night in question he was driving northwardly along Twenty-ninth street, and that while crossing Franklin avenue he drove into an excavation made by the defendants, who were contractors with the city of St. Louis and were repairing the street. There are railroad tracks running along Franklin avenue, and this excavation was on the north side of the tracks and between them and the north curb of the street. The excavation was more than ten feet long and about eighteen inches deep. There was a driveway built along the intersection of Franklin avenue and Twenty-ninth street, so that by keeping in the center of

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Twenty-ninth street the plaintiff could have crossed Franklin avenue without injury. He testified that his reason for not driving in the center of the street was that it was muddy there, and he wanted to keep his cab clean. The plaintiff also testified that he knew that the north side of Franklin avenue was being excavated, but he did not know that the excavation had proceeded as far west as Twenty-ninth street; that there was no red light at that point; that he did not see the excavation until he drove into it; that the night was bright and clear, but that the nearest electric light to the crossing was one block away; that he was driving at an ordinary trot at from four to five miles an hour, and that this was the speed of his team when it dropped into the excavation. The plaintiff also gave in evidence an ordinance of the city of St. Louis, the material portions of which provide:

"Every person, who shall cause to be made any excavation in or adjoining any public street, shall cause one red light to be securely and conspicuously posted on or near such excavation or obstruction, provided such obstruction does not extend more than ten feet in length, and, if over ten feet and less than fifty, two red lights, one at each end, and shall keep such lights burning during the entire night."

The plaintiff was corroborated in his testimony by a passenger in his hack as to the rate of speed at which he was driving, as to the accident, and as to the absence of any red light posted on or near such excavation.

The defendants claim that the court on this evidence should have sustained their demurrer to the evidence, because the inference was unavoidable, that plaintiff's own negligence contributed to the accident complained of. In that view we cannot concur. The plaintiff testified that he did not see the excavation, and this, in view of the fact that

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even on clear nights slight depressions in the ground are discoverable only on close scrutiny, is not devoid of probability. He had a right to rely on it that all parts of the street on which he was driving were in a safe condition, or that, if they were not, the danger signal prescribed by the ordinance would be displayed. That the excavation was one requiring the display of such signal is conceded. That no such signal was displayed was testified to by the plaintiff and another witness. Under these circumstances the question, whether the plaintiff was exercising reasonable care in driving along the highway, was a question of fact to be passed upon by the jury. It was submitted to the jury on instructions favorable to the defendants, and their first assignment of error must be ruled against them.

After the submission of the cause to the jury, they deliberated for one day, and, being unable to agree, they were called into court and the judge in the absence of counsel said to them: "Gentlemen of the jury, I deem it my duty to say to you in this case that I consider the case a very simple one both on the law and on the facts, and one in which the jury ought to come to an agreement. The case does not involve a great deal of money, but it will entail a good deal of expense, not merely to the parties but also to the public, to have a failure of the jury to agree. Now, while I do not wish to compel any juror to give up his just and honest convictions in regard to the evidence in this case, I think it is the duty of the jurors to listen to each other, hear each other's statements and arguments in regard to the matter, and to endeavor to come to an agreement in the case, so as to avoid the necessity of a new trial of a case that is so small. You may retire then, and consider of your verdict further in this case."

The defendants claim that these remarks were prejudicial to them and constitute reversible error.

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Although our statute provides that written instructions should be given by the court to the jury before the cause is submitted to them, it has been repeatedly held that it is not error to further instruct the jury either at their request or where they disagree, but such additional instructions should be in writing, and should be given to the jury in open court, and in presence of counsel if their presence can be had. The reason for the limitation is obvious. The statute provides that the instructions shall be carried by the jury to their room for their guidance, which they evidently cannot do if the instruction is oral. Beyond this, when the court gives instructions either oral or written in the absence of counsel, the parties have neither the opportunity to save their exceptions to such action at the time, nor have they the opportunity of offering additional instructions in explanation of, or supplementing those of the court, should they so desire. For these reasons we must hold that the court erred in further instructing the jury orally and in the absence of counsel, however praiseworthy the action of the court in endeavoring to save to the state and to the parties the costs of a new trial might otherwise have been.

On the other hand we must not lose sight of the fact, that we are authorized to reverse judgments for prejudicial errors only. We have ourselves decided that the mere fact of the instruction being oral is no ground for setting aside a verdict, where the instruction is given in the presence of counsel and is one touching a conceded fact (*Walsh v. St. Louis Drayage Co.*, 40 Mo. App. 339); but we have also decided that error is presumed to be prejudicial, and that to justify an appellate court in affirming a judgment where error has intervened in the trial, the burden is upon the party claiming the benefit of the judgment to satisfy the appellate court that the error was not prejudicial.

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*Clark v. Fairley*, 30 Mo. App. 335. To this rule we have adhered since. On the other hand the supreme court has very pointedly decided, upon a review of the authorities in this and other states, that an instruction given to the jury in the absence of counsel constituted reversible error, although the instruction was in writing and embodied no objectionable elements. *Choteau v. Jupiter Iron Works*, 94 Mo. 388. In that case the jury being out for some time addressed the following written inquiry to the court: "Would it be consistent with the instructions of the court to find for plaintiff with nominal damages?" To which the judge made the following written answer: "It would be consistent to find nominal damages, provided the jury are of the opinion from the evidence that there was no substantial damages sustained by the plaintiff in consequence of the breach of the contract, if there was a breach."

Now, it will be seen that it is next to impossible to uphold the verdict in this case under that decision. Here the instruction had the additional objection of being oral and of embodying two objectionable elements, namely, that the court considered the issues very simple both as to law and fact, and that the controversy was about a small amount. Both of these propositions are irrelevant to the merits of the case and yet may have influenced the jury in their decision, since the plaintiff was a hack driver of presumably limited means, and the defendants were contractors of presumably sufficient means not to feel so small an amount. Nor can we see our way to an affirmance of the judgment by treating the remarks of the court as purely cautionary, and as not an "instruction" in the technical sense of that term. Cautionary remarks are addressed to the jury touching their conduct while considering the case, and not touching any elements to be weighed by them in its consideration.

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As we feel compelled to reverse the judgment for this error, we will add the following, which may facilitate the final settlement of the controversy. The defendants' witnesses testified to facts which, if believed by the jury, would have justified them in finding that the defendants had used reasonable care and diligence in placing lights on the obstruction and in keeping them burning all night. The court instructed the jury upon defendants' request that the burden of proof rested upon the plaintiff to show that the defendants were careless and negligent in placing or failing to place the danger signals, or in keeping the same burning at the intersection of Twenty-ninth and Franklin avenue. The court also instructed the jury as to the meaning of ordinary care, as applicable to both parties. These instructions were over-favorable to the defendants. The duty to place such lights and keep them burning is an imperative duty under the ordinance, the violation of which is negligence *per se*. In such cases unavoidable accident will excuse the defendants, but the rule of ordinary care finds no application. This conclusion is the logical result of our ruling in *Jelly v. Pieper*, 44 Mo. App. 380, and of that of the supreme court in *Fath v. Railway*, 105 Mo. 537, 548.

The judgment is reversed and the cause remanded. All the judges concur.

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ENTERPRISE SOAP WORKS, Respondent, v. HENRY SAYERS *et al*, Appellants.

**St. Louis Court of Appeals, November 7, 1893.**

1. **Law and Fact:** INTERPRETATION OF WRITINGS: RESCISSION OF CONTRACT OF SALE. The interpretation of writings is always for the court, except when they are ambiguous and the ambiguity must be solved by extrinsic unconceded facts, or when they are adduced merely as containing evidence of facts from which different inferences can be drawn, and when it is for the jury and not for the court to

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draw these inferences. And held that correspondence in evidence in this cause, which was offered to establish the rescission of a contract of sale, did not fall within either of these exceptions.

2. **Rescission of Sale**: TENDER, WHEN UNNECESSARY. A tender need not be shown, when it conclusively appears that it would have been fruitless, if made.

3. ———: RECOVERY OF PURCHASE MONEY: MEASURE OF RECOVERY. A vendee of merchandise, after payment of the purchase money, duly rescinded the sale. Subsequently he caused this merchandise to be attached in a suit against the vendor in a foreign jurisdiction for the recovery of this purchase money, and to be sold under a judgment *in rem* recovered by him therein. Later still he sued the vendor *in personam* for the purchase money. *Held*, in the latter suit, that the vendor was entitled to credit only for the net proceeds of the sale under the judgment *in rem*, and not for the reasonable value of the merchandise sold.

*Appeal from the St. Louis City Circuit Court*, HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*R. M. Nichols*, for appellants.

(1) The fact that respondent, having discovered the tallow was not up to sample on November 17, 1889, continued for two months, without rescinding the contract, to negotiate for the tallow, under the contract, but at a rate below the contract price, is, together with a delay in rescinding the contract for a period of two months, such an exercise of dominion over the tallow as would amount to an acceptance and a waiver of its right to object on account of quality. Tiedeman on Sales, sec. 114; Benjamin on Sales [4 Am. Ed.], sec. 703; *Genethal v. Schnider*, 52 How. Prac. 134; *Lawrence, v. Dale*, 3 Johns. Ch. 30; *Stafford v. Pooler*, 6 Barb. 148; *Hallon v. Johnson*, 83 Pa. St. 222; *Hirshhorn v. Stewart*, 49 Iowa, 418; *The Dutchess Co. v. Harding*, 49 N. Y. 323. (2) To place the other party in *statu quo* by a return, or an offer to return, is an absolute

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condition precedent to the exercise of the right of rescission. *Cahn v. Ried*, 18 Mo. App. 124; *Melton v. Smith*, 65 Mo. 324; *Tower v. Pauley*, 51 Mo. App. 75. (3) The first instruction was erroneous, in that it ignored the evidence as to the market value of the goods taken by respondent at Nashville, and told the jury to find a verdict for the difference between the amount paid as purchase money and the net proceeds realized from the sale of the goods under the attachment. If respondent had appropriated the goods without the judicial proceedings in Tennessee, in the present action it would be compelled to allow appellants their market value, as a credit, and how can the judgment, by which appellants are in no way bound, change that rule? *Spencer v. Vance*, 57 Mo. 427. (4) The instruction was further erroneous, in the fact that it substituted the price which the goods brought at a forced sale in the place of the market value of the goods, the evidence of a forced sale being no evidence of the market value, and inadmissible. *Lawrence v. City of Boston*, 119 Mass. 126; *Everett v. Railroad*, 59 Iowa, 445; *Railroad v. Daughty*, 22 N. J. L. 495.

*Geo. R. Lockwood*, for respondent.

(1) The refusal of respondent to accept the tallow, and its tender back of the tallow, through its letters, effected a rescission of the contract of purchase. Story on Sales [4 Ed.], secs. 417 and 418; *Grimoldy v. Wells*, 10 Com. Pl. (L. R.) 391; *Calhoun v. Paule*, 26 Mo. App. 274. (2) A tender back of the tallow was not necessary, as it was apparent that appellant would not accept and refund the purchase price. *Calhoun v. Paule*, 26 Mo. App. 274. (3) Whether respondent refused to accept the goods sent and tendered them back within a reasonable time was in this case a ques-



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tion to be determined by the jury, and not the court. *Calhoun v. Paule*, 26 Mo. App. 274; *Gaus & Sons Mfg. Co. v. Mayer, etc., Mfg. Co.*, 42 Mo. App. 307; *Johnson v. Whitman, etc. Co.*, 20 Mo. App. 100; *Tower v. Pauly*, 51 Mo. App. 75; Tiedeman on Sales, sec. 115. This action was for the recovery of so much of the purchase price as had not been recovered by the attachment and sale of the goods shipped respondent, and not for damages for breach of warranty. *Johnson v. Whitman, etc. Co.*, 20 Mo. App. 100; *Calhoun v. Paule*, 26 Mo. App. 274; *Enterprise Soap Works v. Sayers*, 51 Mo. App. 310.

ROMBAUER, P. J.—This cause is here on its second appeal. On the former appeal (51 Mo. App. 310), we decided that two counts in a petition are inconsistent, where one seeks a recovery of damages for a breach of warranty in the sale of chattels, and the other a recovery on the ground that the sale had been rescinded by the plaintiff for cause. Our decision in short was to the effect that the affirmance of a sale in one count, and its denial in another, were inconsistent in point of fact, because the proof of one cause of action necessarily disproved the other. Both could not be true.

The case being remanded for new trial, the plaintiff elected to proceed as upon a rescission of the sale. The case was tried on that theory, and the plaintiff again recovered judgment. The defendant appeals, and assigns for error that there was no evidence that the defendant had rescinded the contract, and that the cause was submitted to the jury on erroneous instructions. These assignments we will proceed to consider in the order stated.

The entire evidence touching the contract and its rescission is in writing. "The interpretation of writings

is always for the court except in two cases. *First*, where the writing is ambiguous and the ambiguity must be solved by extrinsic unconceded facts, and next where the writing is merely adduced as containing evidence of certain facts, from which different inferences may be drawn, and where it is for the jury and not the court to draw the inferences. *Mantz v. Maguire*, 52 Mo. App. 146. In the case at bar the court, upon the writings adduced, declared, as a matter of law, that the contract in question was rescinded by the plaintiff, but left it to the jury to find whether it was rescinded for good cause and within a reasonable time. Whether the court erred in so holding must be determined from such writings and extrinsic conceded facts.

The plaintiff resides in Nashville, Tennessee, and the defendants in St. Louis, Missouri. On October 25, 1889, the defendants wrote to plaintiff as follows: "We to-day mail you a sample of prime tallow, which passed through fire and is in consequence discolored by smoke; in every other respect is uninjured. We can sell you one hundred and fifty barrels of same (in syrup barrels) at four and one-eighth cents per pound, we paying freight to your city. Above, provided unsold when hearing from you. Please wire at our expense if you can use it."

To this the plaintiff replied by wire October 28: "Will take tallow. Hold for instructions; if sold answer."

The defendants thereafter, having received instructions from the plaintiff as to the shipment of the tallow, shipped the same November 6, and on November 7, drew their bill of exchange, payable one day after sight, upon the plaintiff for $1,871.62, the contract price of the tallow, which the plaintiff accepted and paid prior to the receipt of the tallow. The tallow arrived in Nashville on November 16th, and was delivered to the

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plaintiff shortly thereafter. The plaintiff thereupon wrote to the defendants under date of November 19th:

"We have gotten in the tallow, and regret that we have to make complaint of same. You spoke of having shipped it from some other point, and so we presume you have never examined it; for, if you had, we don't think you would have sent us such stock. It is not up to sample, and is very watery. As soon as the driver got the first load he came to the office and reported it full of water, before we examined it; he discovered it in rolling the barrels. When we examined it, we found he was correct. We send you a sample, that you may judge for yourself. If that is not satisfactory, we shall expect you to come, or send some one here to represent you, so that the matter can be adjusted in a satisfactory way, without any resort to law. If you cannot send or come, you can name any dealer here, and we will appoint one, these two to select the third man, and we will abide the decision of such a committee. We would much prefer that you come yourself. Please let us hear from you by return mail, and oblige."

To this the defendants replied under date of November 20th: "Your favor of the nineteenth to hand, and will say that its contents surprised us greatly. * * * The tallow itself is, we are confident, fully up to sample. * * * But as to water, that is another matter; we did not intend to ship you any water, and do not expect you to pay for it. Our representative assured us no watery barrels went forward, as this was a special injunction to watch for water. If, in spite of his care, barrels containing water were sent forward, we are willing to make it good to you. Let us know how many barrels contained water, and what quantity."

To this the plaintiff replied under date of November 22nd: "We have your letter in reply to ours. Accept thanks for prompt reply. As we expected, you think

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we are mistaken about tallow not being up to sample. We have never asked you to take our opinion in the matter. We have seen the tallow and compared it with sample, and don't hesitate to say that it is not what we bought. * * We proposed a fair and honorable way to determine whether our claim is just or not, and we trust you will yet see that the best way to settle the dispute is to arbitrate it. * * So, kind friends, we have the sample and the tallow, and are not afraid of the result of any comparison, and you might as well come down to business at once. We have got the evidence that can't be gotten around, and insist on a settlement."

To this the defendants replied under date of November 23rd: "We do not wish to do anything unjust or unfair, but we can only say, as we did before, we will reimburse you for water shipped."

To this the plaintiff replied under date of December 7th: "*We have not used a barrel of the tallow, and do not intend to until the matter is settled either by arbitration or a lawsuit.* We have no sort of doubts as to what we can prove in a suit, but would prefer to have you settle without going that far. * * Now, as a last proposition to settle the matter peacefully, we agree that, if you will come or send a man to Nashville, and we do not prove the tallow below sample, we will pay the railroad fare both ways. Let us hear from you and oblige."

To this the defendants replied under date of December 9th: "Let us know what you consider a fair allowance for the alleged difference in quality. Would rather present you the amount that a trip to Nashville would cost, than expend it for railroad fare, etc."

To this the plaintiff replied under date of December 12th: "We received your last letter, and have delayed a few days in answering. We wish you had

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agreed to come or send to Nashville, as we do not wish this thing settled on what we say; and, as we think seeing is believing, we would rather have you here to look at it yourself than any man in the world. However, you are not here; so we put ourselves to the trouble of bringing in several gentlemen and let them sample the stock you sent us. We enclose their statements, from which you can see the stuff is very bad. * * * *We would prefer that you take the tallow off of our hands and refund our money. In fact, we would be willing to haul it to the depot for you free of charge.* However, if we keep it, we must have a reduction of $600. We would add that we paid freight on it to the amount of $231.26, while you only allowed $183.83. *We have not used a barrel of the tallow, and it is very much in our way; so we wish you would decide at once to take it off of our hands.* We don't think $600 fully covers the loss on it, but are willing to place it at that figure, if that will effect a settlement and prevent the trouble and expense of a law suit."

To this the defendants replied under date of December 13th: "Yours, twelfth, to hand. Please express at our expense a sample of the tallow drawn from say twenty-five barrels, and in quantity say ten pounds, and oblige."

To this the plaintiff replied under date of December 18th: "At your request we send 10 pounds of samples of the tallow. Our soapmaker says he took it from 35 different barrels."

To this the defendants replied under date of December 24th: "Yours 18th to hand, also sample. To end this matter, we will make an allowance of 1-4 c. per lb. on the tallow, and also collect and repay to you the overcharge in freight. Send us the freight bill you paid, so we can make claim on R'y Co., and your sight drafts for these two amounts will be honored."

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Only such portions of the above letters are set out herein, as bear upon the present inquiry.

After the receipt of the last letter the plaintiff placed the claim into the hands of an attorney, who, under date of December 30th, wrote to the defendants as follows:

"The Enterprise Soap Works Co., of this city has turned over to me the correspondence touching a contract for 150 barrels prime tallow, with instructions to work out for the Co. their rights in the matter. Now, from the facts as I gather them, there is no doubt that the contract was an executory one, and that the E. S. Wks. has the right to inspect the goods and reject them, if not up to the quality contracted for. And inasmuch as the contract is executory, the only remedy of the E. S. Wks. is to reject the goods; for by accepting them with the knowledge of the defects would be to waive the defects. But, inasmuch as they have already paid for the goods, they would rather lose something in a compromise of the matter, than to incur the risks and delay of litigation. *What they desire most is to get back their money, and you take your goods.* In that event they will take their money without interest, and put the goods on cars without charge to you. If you would prefer to let them take the goods and deduct $600 from the price of the goods and repay to them that amount, they will settle the matter that way. If you are not willing to either of these propositions, then the only thing left to the E. S. Wks. will be to proceed to sue—*have the tallow sold by order of the court, apply the proceeds to the costs and amount due E. S. Wks. from you, and hold you for the balance.* This I am instructed to do, unless you do one of the other of the two things mentioned above. Please let me hear from you at once."

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To this letter the defendants replied, their letter bearing date December 31st, but not being mailed until some time thereafter, as follows:

"Yours of the 30th noted. As we also wish to avoid unpleasant litigation, we are willing to make a concession within reason. But, rather than allow $600, we will take the chances of the courts."

Upon a receipt of this last letter the plaintiff instituted suit by attachment against the defendants in Nashville, and caused the writ of attachment to be levied upon the one hundred and fifty barrels of tallow in its possession. The plaintiff's attorney mailed a copy of the publication made in that suit to the defendants. Whether the defendants received this notice is not quite clear, but it stands admitted that they had notice of the pendency of the attachment suit, brought by the plaintiff against them at Nashville, before its termination.

Upon the written evidence above set out, the inference is unavoidable that the plaintiff did everything it was required to do to enable it to claim a rescission of the contract. It is true the plaintiff had *received* the tallow, but there is no expression in any of its letters which could be tortured into an admission that it had *accepted* it. The difference between these two propositions is too well settled in the law of sales to admit of any dispute. Benjamin on Sales, sections 1345, 1346; *Gaibout v. Clark*, 24 Mo. App. 426; *Calhoun v. Paule*, 26 Mo. App. 274. We concede that the vendee must exercise his right of non-acceptance within a reasonable time, but the delays in this case were owing to the acts of the vendor, and not to those of the vendee; hence the case is lacking all elements which would enable the court to declare as a matter of law that the ultimate refusal on part of the vendee to accept the goods, and the institution of the suit for a recovery of

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the purchase money, did not occur within a reasonable time.

Equally untenable is the further objection made by the defendants, that there was not at any time a tender on part of the plaintiffs to return the goods. Such a tender is distinctly made in plaintiff's letter of December 12th. Besides, it appears from all the evidence not only that the tender made was unavailing, but that a more specific tender, *if made*, would have been equally unavailing. Where it conclusively appears that a tender, if made, would have been fruitless, it need not be shown. *McManus v. Gregory*, 16 Mo. App. 375; *Harwood v. Diemer*, 41 Mo. App. 48.

We must, therefore, hold that the court committed no error in submitting to the jury only the questions whether the plainiff had just cause to rescind the contract, and whether it exercised the right within a reasonable time. If these two elements were found by the jury, it resulted as a matter of law from the writings in evidence that the plaintiff had rescinded the contract.

Complaint is also made of the instructions of the court on the measure of damages. The uncontroverted evidence showed that the plaintiff had caused the defendant's goods to be attached at Nashville and to be sold on execution, and that it realized upon such sale a certain amount, which the court directed the jury to credit to defendants in case they found for the plaintiff. This the jury did. The defendants now claim that the court should have directed the jury to allow to the defendants the reasonable market value of such goods at Nashville, and not the net proceeds of their sale. This contention is devoid of all foundation. This action is for money had and received, and the defendants are entitled to such credits only as they or their property have paid to the plaintiff in money or its equivalent. The case stands exactly upon the same

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footing as if plaintiff had levied its execution on other property of the defendants than the one in controversy, and had realized a certain amount upon such sale. It is not claimed that the court in Nashville did not have jurisdiction to have the property subjected to plaintiff's process, nor that there was any illegality in the sale under that process; hence any analogy with the rule in cases of a conversion of goods is wholly inadmissible.

Seeing no error in the record, we affirm the judgment. All the judges concur.

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FREDERICK STORCK, *et al.*, Respondents, v. BENJAMIN T. MESKER, *et al.*, Appellants.

St. Louis Court of Appeals, November 7, 1893.

1. **Practice Appellate:** WAIVER OF DEMURRER TO EVIDENCE. An instruction of non-suit was offered and refused at the close of the plaintiff's evidence, and thereon renewed at the close of the case. *Held* that, in the review of these rulings, the entire evidence should be considered.

2. **Contracts:** CONSIDERATION. A contractor for the erection of a building sub-let a portion of his contract, which the sub-contractor failed to execute in accordance with its provisions. Thereon it was agreed between the contractor and sub-contractor that the work should be repaired at their joint expense, so as to make it answer the requirements of the contract in respect to the deficiencies then known to the contractor. After the repairs had been partly proceeded with, the contractor ascertained that the work was deficient in other respects, and refused to carry out this agreement. *Held* that this agreement for repairs at joint expense was without consideration, and, notwithstanding its partial performance, was not obligatory on the contractor.

3. ———: EVIDENCE OF DAMAGES FOR BREACH. When a contractor sub-lets a part of his contract, and the sub-contractor fails to perform his part of the work in conformity with the contract, the former cannot establish the quantum of his damages against the latter, nor his right to substantial damages, by proof that he had agreed upon their amount with the person with whom he had contracted, and thereon paid it.

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4. ———: EXTRINSIC EVIDENCE OF CUSTOM. Extrinsic evidence is admissible in the construction of a building contract to show that a term in it, such as a requirement for "old style roofing tin," had by the usage of trade acquired a peculiar signification.

5. ———: ORAL EVIDENCE IN VARIANCE OF ITS TERMS. But evidence of a contemporaneous oral agreement between the parties to the contract, inconsistent with a technical term used in it, is not competent.

6. **Instructions:** MEASURE OF DAMAGES. NON-DIRECTION. While it is the better practice to instruct the jury as to the measure of the damages, the failure of the court to do so amounts only to non-direction, and therefore is not ground for the reversal of the judgment.

*Appeal from the St. Lonis City Circuit Court.*—HON. DANIEL DILLON, Judge.

AFFIRMED.

*Nathan Frank* and *Chas. W. Bates*, for appellants.

(1) The practical interpretation of an ambiguous written contract may be shown by parol evidence of the acts of the parties, and should control. *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo., 121, 128; *Matthews v. Danahy*, 26 Mo. App., 660; *Deutmann v. Kilpatrick*, 46 Mo. 624; *Sedalia Brewing Co. v. Sedalia Water Works*, 34 Mo. App. 49; *Jones on Construction of Contracts*, sec. 95, and cases cited. Parol evidence is admissible of the circumstances surrounding the execution of an ambiguous written contract and its subject-matter; the relation of the parties and their conversations in reference thereto before, at and about the time of its execution. *Black River Lumber Co. v. Warner*, 93 Mo. 374: *Reisenleiter v. Lutherische Kirche*, 29 Mo. App. 291; *Thorington v. Smith*, 8 Wall. 1; *Quarry Co. v. Clements*, 38 Ohio St. 587; *Galen v. Brown*, 22 N. Y. 37; *Birch v. Depeyster*, 1 Stark, 210; 4 Camp. 385; *Sweet v. Shumway*, 102 Mass. 365; Browne on Parol Evidence, sec. 54, pp. 190, 191; *Haddock v. Woods*, 48

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Iowa, 433; *Quigley v. De Haas*, 98 Pa. St. 292. (2) The compromise of a disputed claim for unliquidated damages and a threatened lawsuit is a complete bar to an action on the original claim, so long as the defendant is in good faith performing the compromise, and is ready and willing to perform the same according to its terms. *Hunt v. Hvnter*, 52 Mo. App. 263; *Maack v. Schneider*, 51 Mo. App. 92, 102; *Perkins v. Headley*, 49 Mo. App. 556; *Fuller v. Kemp*, 33 N. E. Rep. 1034; *Deutmann v. Kilpatrick*, 46 Mo. App. 624: *Adams v. Helm*, 55 Mo. 468; *Dunham v. Griswold*, 100 N. Y. 224; *Mitchell v. Henley*, 110 Mo. 598; *Green v. Railroad*, 82 Mo. 653; *Black River Lumber Co. v. Warner*, 93 Mo. 374; *Smith v. Coal Co.*, 36 Mo. App. 567; *Tureman v. Stephens*, 83 Mo. 218; *Imboden v. Ins. Co.*, 31 Mo. App. 321. (3) Defendant's demurrer to the evidence should have been sustained. *Whitascheck v. Glass*, 46 Mo. App. 209; *Kingsland, etc., Co. v. Iron Co.*, 29 Mo. App. 526; *Martinowsky v. City of Hannibal*, 35 Mo. App. 70.

*Kehr & Tittman*, for respondents.

(1) There is no ambiguity, either patent or latent, in the written contract, and parol evidence to vary or contradict the same is inadmissible. (2) Neither the promise to do a thing nor the actual doing of it will be a good consideration, if it is a thing which the party is already bound to do, either by the general law or by a subsisting contract. *Lingenfelder v. Wainright, etc., Co.*, 103 Mo. 578, and authorities there cited in brief on page 587 and by the court on page 593. (3) The contract and its breach being shown, plaintiff was entitled to recover and defendant's instruction was properly refused. (4) In civil cases the court is not required to give instructions, where none are asked. *Dempsey v. Reinselder*, 22 Mo. App. 43-45; *Tetherow v. Railroad*,

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98 Mo. 74-86; *Drury v. White*, 10 Mo. 354; *Simonds v. Oliver*, 23 Mo. 32; *Harrington v. Minor*, 80 Mo. 270.

BIGGS, J.—The plaintiffs were contractors for the building of the Abbey New Engelberg in Nodaway county.. The building was to be constructed under written specifications. For the tin and galvanized iron work the specifications provided as follows: "All the roofs, excepting spire, to be covered with *old style roofing tin, very best quality*, with standing seams, and well painted on the inner side before laid. The two spires to be covered as the rest of the roof. The cupola to be covered with ornamented galvanized shingles. The gutters and valleys to be lined with the best valley tin, and to run under the roof at least six inches. The conductors to be of the best, No. 26, Juniata galvanized iron. All angles and all other necessary places to be covered with best tin, as above, all well soldered and rosined, and made perfectly water-tight, and put up as indicated on plans, or as may be directed, with all necessary curves, breaks and bends, etc., to carry the water from the several roofs to within one foot of the ground. The conductors to be four inches from the upper roof and six inches from the lower roof, and thoroughly secured with iron hooks; all necessary places to be flush, whether specified or not, and made water-tight. All leaks to be stopped after other craftsmen, and *all left perfectly water-tight upon the completion of the building*. All galvanized iron cornices to be as per drawings and details, and of the best, No. 26, Juniata galvanized iron. All work done and all material furnished must be of sufficient quality and quantity for its various uses, so as to fully carry out the evident intent of the design, and anything omitted in either plans or specifications, necessary to complete the job, must be done by the con-

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tractor or contractors notwithstanding such omissions. The entire work must be constructed and finished in every part in a good, substantial and workmanlike manner, according to the accompanying drawings and the specifications to the full extent and meaning of the same, and to entire satisfaction, approval and written acceptance of the architect and the owner."

On the eighth day of July, 1889, the defendants, who reside in St. Louis, agreed and contracted with the plaintiffs in consideration of the sum of $1984 to furnish the materials and construct all the items of work above specially set out, the materials and work to be of the quality and kind required by the aforesaid specifications. The work was completed and paid for in the fall of 1889.

For a cause of action the plaintiffs allege in substance that the defendants, in constructing the roof, did not use "*old style roofing tin of the best quality*," but used other greatly and inferior tin in the roof, and that, by reason of the careless and unskillful manner in which the tin was put on, the roof was never water-tight, but always leaked, and was never fit for the purposes for which it was intended. It was also averred that the defendants did not cover either of the two spires with "old style roofing tin of the very best quality," but that they covered them with an inferior and cheaper brand of tin; that the work thereon was not done in a workmanlike manner, but was carelessly and negligently done. The same averments were made as to the materials used and the work done in the construction of the angles, and it was alleged that by reason of all of this the roof was never water-tight, but continued from the fall of 1889 to the summer of 1892 to leak, when it became necessary to remove it and to put a new one on; and that, in doing this, the plaintiffs expended the sum of $1500.

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It was conceded by the defendants that the roof was not put on in a good workmanlike manner, that it was not water tight, and that it continued to leak until the summer of 1892. As a defense or rather as a bar to the action it was alleged in the answer, and sought to be established on the trial, that, after the defendants had been notified of the defective condition of the roof, the plaintiffs' claim against them growing out of the construction of the roof was compromised, wherein it was agreed that the plaintiffs and defendants would repair the roof, each party paying one-half of the cost; that in pursuance of this agreement they proceeded to repair the roof, but, before the repairs were completed, the plaintiffs withdrew from the arrangement and notified the defendants to put on an entirely new roof, or that plaintiffs would do so at the expense of the defendants.

The reply was a denial of the new matter contained in the answer.

There was a verdict and judgment for the plaintiffs for one thousand dolllars. From this judgment the defendants have appealed, and they urge that under the law and the evidence the plaintiffs were not entitled to a judgment, and that the court erred in rejecting competent and relevant testimony offered by them.

At the close of the plaintiffs' evidence in chief the defendants asked the court to declare as a matter of law that the plaintiffs could not recover. This the court refused to do. At the close of all the evidence the instruction was renewed, and the court again refused it.

The defendants, by introducing evidence, waived the demurrer to the plaintiffs' evidence to the extent of assuming the risk of supplying by their own evidence the defects, if any, in the plaintiffs' case. *Eswin v.*

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*Railroad*, 96 Mo. 290; *Weber v. Railroad*, 100 Mo. 195. Therefore, this assignment of error must be determined by examining *all* the evidence.

The argument of the defendants' counsel in support of this assignment is based on the proposition that the alleged compromise agreement discharged the defendants from liability on the original contract.

It is undisputed that the roof was not constructed of what is known to the trade as "old style roofing tin;" that the roof was badly put on, and that it continued to leak until the summer of 1892, notwithstanding the attempts by plaintiffs and defendants to repair it. After one or two interviews between the parties and the church authorities, who were demanding that the roof be taken off and replaced by another, and who were threatening to sue the plaintiffs if this was not done, the following correspondence was had between the plaintiffs and the defendants:

"St. Louis, Mo., May 18, 1892.

"*Messrs. Storck & Brinks, Twelfth and State streets, Quincy, Ill.*

"Gentlemen: We were sorry we could not see you again while you were down here. While we have always expressed our willingness to do all we possibly could to make the roof right, which we now again confirm, but after we once get it tight we would not be responsible for it. Since thinking over the matter seriously, we do not think it proper to take off the present tin roof and relay it. We are satisfied in our own minds that we can make it perfectly tight, notwithstanding the trouble and expense we have been to, without taking the present tin roof off and relaying it. We also wish to state that it will cost us a great deal more to put on a tin shingle roof, as you suggest, we to furnish a first-class tinner and you to do the same, and both to put on and finish the roof together, and the church to

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furnish all the material; while we do not wish to be arbitrary and want the good will of you all, and notwithstanding it will cost us considerable more money, we will agree to do so, namely, you to furnish, as well as ourselves, a first-class tinner apiece, and they to put on the tin shingle roof and complete it together, and we to receive the old tin, and you or the church to release us from any damage done now and hereafter caused from the leaky roof.

"If this is satisfactory please advise us, and we will send a first-class man at any time you may say.

"Trusting that our relations may continue to be of the very pleasantest, and that you will favor us with any future orders, we remain,

"Yours respectfully,
"MESKER & BRO."

"QUINCY, ILL., May 25, 1892.

"*Messrs. Mesker & Bro., St. Louis, Mo.*

"GENTS: We received your letter, you stating you will make a tight roof on the church in Conception. We got a letter from Father Placitus, which I will lay by. The best will be to give satisfaction, take the tin off and replace it and throw out the bad tin, and, if you will do that, we will stand half of the expense; you to send a first-class tinner, and we will send a first-class tinner, you to furnish the tin and we will pay for half the tin, and we will have a tight roof. Please answer at once and show your good will, and we will try to give you new orders.

"Respectfully yours,
"STORCK & BRINKS."

"ST. LOUIS, MO., June 1, 1892.

"*Messrs. Storck & Brinks, Quincy, Ill.*

"GENTLEMEN: We should have answered your letter long before this; the writer has been out of the



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city and just returned this morning. In answer to yours of the 25th ult. is at hand, and is perfectly satisfactory to us with one exception, that we do not think it necessary to take off all the tin and relay it, but wherever there is a bad seam, and, in the judgment of the mechanic, should be taken out, he shall do so. As we stated before, the roof can be made tight without taking up the entire tin and relaying it. And if this can be done, we do not see why you and ourselves should be compelled to throw money away in that manner; and the number of rolls taken up must be left with the mechanics that are sent up, as they are the ones that certainly should know how many are to be taken up, and this must be left in their hands, and no one else, outside of them, should determine how many rolls of tin shall be taken up. Under those conditions we will proceed at once to send a first-class man, and you do the same; also, as stated in yours of 25th ult., you stand half the expense and we the other half. If this is satisfactory, let us know at once when to send our man. Respectfully yours,

"MESKER & BRO."

"QUINCY, ILL., July 12, 1892.

"*Messrs. Mesker & Bro., St. Louis, Mo.*

"GENTLEMEN:—In a week or ten days we will be ready for going to Conception to make the church roof tight; and as you always said you would be ready any time, so we trust you will not make any delay on the work from your side. We hope you also will have the necessary tin ready for it. Please send two pair of tongs along, as the man we engaged has got none. I will write a few days before the date we wish to be at Conception, and I will go there myself and help get the work started, and I hope we will give satisfaction. Please answer as soon as you will be ready.

"Respectfully yours,

"STORCK & BRINKS."

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As a result of this correspondence each party furnished a tinner to make repairs on the roof. The mechanics proceeded with the work for several weeks, and before its completion Father Placitus, the representative of the church, ordered the work stopped and demanded of the plaintiffs that the old roof be taken off and replaced with a new one, because it was ascertained that that portion of the roof, which had been repaired, leaked in several places, and also for the reason that the tin used was not "old style roofing tin" as required by the specifications, but was of a different and inferior quality of tin. Thereupon, the plaintiffs notified the defendants of the demands of Father Placitus, and required of them the construction of a new roof in accordance with the specifications. The defendants having failed within a reasonable time to accede to the demand, the old roof was removed, and a new one substituted.

The letters show an agreement to repair the roof at the joint expense of the parties; but there is no evidence of a consideration for the agreement, as the defendants were already bound by the terms of their contract to do what the letters contemplated should be done. *Lingenfelder v. Wainright Brewing Co.*, 103 Mo. 578. The letters merely contemplated the carrying out of the defendants' original contract. Neither did a part performance of the agreement furnish a consideration for it, nor estop the plaintiffs from denying its binding force as against them. The defendants represented that they could repair the roof so as to make it water tight, in which they failed, as the uncontradicted evidence shows. This was the inducement to the plaintiffs to enter into the contract. Besides it appears from the plaintiffs' evidence, which is in no way contradicted, that, after the repairs were commenced, they learned for the first time that the roof was not constructed of "old style roofing tin," which fact entitled the repre-

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sentatives of the church to reject the roof altogether as they had never finally accepted it; *Mohney v. Reed*, 40 Mo. App. 99; *Haysler v. Owen*, 61 Mo. 273; *Eyerman v. Cemetery Ass'n*, 61 Mo. 490; *Yeats v. Ballentine*, 56 Mo. 530; *Halpin v. Manney*, 33 Mo. App. 388. For these reasons we think that the alleged compromise agreement was without consideration, and therefore was not binding on the plaintiffs.

It is next insisted that the evidence was not sufficient to warrant the recovery of substantial damages.

When the defendants failed to remove the old tin roof, Father Placitus, by and with the consent of the plaintiffs, determined to replace it with a tin shingle roof, which the evidence shows was much more expensive then the one provided for in the specifications. Thereupon, in settlement of the claim of the church against the plaintiffs, the latter agreed to and did pay to Father Placitus the sum of $1,500.00 towards the construction of the new roof. It was incumbent on the plaintiffs, in order to recover substantial damages, to go further than this and introduce some evidence tending to show the reasonable cost of a roof constructed in accordance with the specifications. The mere fact, that they paid the church $1,500.00 towards the construction of an entirely different kind of roof, proved nothing. It did not furnish any basis for the measurement of the damages of the plaintiffs. However, this insufficiency in the plaintiffs' evidence was remedied by that introduced by the defendants. One of the defendants tesitfied that a new roof, constructed of "old style roofing tin," would have cost between $950.00 and $1,300.00, according to the brand of "old style tin" used. The recovery being for $1,000.00 was within the limits of this evidence. We must, therefore, hold that there is no merit in this assignment of error.

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It appeared upon the trial that the term "old style roofing tin" referred to certain brands of tin which were manufactured in a certain way, and that the meaning of the phrase was so understood by "the trade." It was competent to show this by parol evidence; this in no way tended to vary the contract, but only to explain it. But it was not competent for the defendants to prove, as offered, that it was understood at the time they made their bid that they could use other tin than "old style roofing tin of the best quality," as understood by dealers in tin. Such evidence would clearly have tended to vary the contract. The refusal of the court to admit this testimony constitutes the third assignment of error.

The admissibility of oral evidence to explain the meaning of technical terms in mercantile contracts is well supported by the decisions and the text-books. Browne on Parol Evidence thus states the rule: "Extrinsic evidence is admissible in the construction of a mercantile contract to show that phrases or terms used in the contract have acquired by the custom of the locality, or by the usage of trade, a peculiar signification, not attaching to them in their ordinary use, and this whether the phrases or terms are, in themselves, apparently ambiguous or not." (Browne on Parol Evidence, sec. 57, p. 202.) And the same author says that such evidence has no tendency whatever to change or vary the contract.

This rule has been applied in this state in the case of *Soutier v. Kellerman*, 18 Mo. 509. There the contract called for the delivery of four thousand shingles. The defendant delivered eight bundles containing by actual account two thousand and five hundred shingles. The defendants' evidence tended to show that, by the custom of the lumber trade, the eight packs of shingles were properly reckoned as four thousand shingles.

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Touching this defense the court said: "The usage of a particular trade is evidence from which the intention and agreement of the parties may be implied; and, although it cannot control an express contract, made in such terms as to be entirely inconsistent with it, yet, in express contracts, the terms employed have their true meaning and force best understood by reference to such usage. Evidence of such usage is admitted, not to vary the terms of an express contract or to change its obligation, but to determine the meaning and obligation of the contract as made."

The offer of the defendants to prove that, at the time they made their bid, it was orally agreed that they could use in the construction of the roof a brand of tin, not known as "old style roofing tin," was clearly outside of the rule as stated by the supreme court, since it is clear that such evidence would have been inconsistent with the terms of the written contract, in that it would have varied the obligation of the defendants under it. Hence, the court did right in excluding the evidence.

The failure of the court to instruct the jury as to the measure of damages presents a case of non-direction merely, which is not reversible error. It is the better practice to instruct the jury on the subject, as the measure of damages is always a question of law. But, when the court fails to do so, causes cannot be reversed for this reason alone.

Finding no error in the record that would justify the reversal of the judgment, it will be affirmed. All the judges concur.

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WILLIAM KELLY, Respondent, v. THOMAS E. GAY *et al.*, Appellants.

**St. Louis Court of Appeals, November 7, 1893.**

**Principal and Agent:** APPLICATION OF PROCEEDS OF THE SALE OF REALTY. The plaintiff through his agent authorized the defendants to sell certain real estate for him. The sale was made, and the proceeds paid to this agent, excepting that a portion of them was applied to the satisfaction of a forged deed of trust on the realty, which this agent had executed prior to his employment, and of the existence of which the plaintiff was ignorant. *Held*, that the plaintiff was entitled to recover from the defendant the amount thus applied.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*T. J. Rowe*, for appellants.

(1) No person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest to the injury of the one from whom he derived the benefit. *Austin v. Loring*, 63 Mo. 19. (2) When one of two innocent parties must suffer by a third, the one who has enabled such third party to occasion the loss ought to sustain it. *Rice v. Groffman*, 56 Mo. 434. (3) The power to sell includes the power to receive payment. Glass had the power to sell, and, having such power, payment to him was proper. Story on Agency, sec. 102; *Tumley v. Corbett*, 18 Cal. 494; *Summer v. Saunders*, 51 Mo. 89; *Brooks v. Jamison*, 55 Mo. 505. (4) A principal, who takes the proceeds of an unauthorized act on the part of his agent, thereby ratifies the act and makes it his act. *Davis v. Krum*, 12 Mo. App. 279.

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*M. W. Huff* and *James E. Hereford*, for respondent.

(1) An agent authorized to sell goods has no authority to take anything but money in payment. *Buckwalter v. Craig*, 55 Mo. 71; *Wheeler, etc, Co. v. Givan*, 65 Mo. 89; *Greenwood v. Burns*, 50 Mo. 52. (2) One authorized to sell real estate is not authorized to receive money. Parsons on Contracts, p. 128; *Stewart v. Woods*, 63 Mo. 252.

Biggs, J.—On the trial of this cause no exceptions were saved to the action of the court in admitting or rejecting evidence, and no instructions were asked or given; hence we must affirm the judgment, if it can be sustained on any possible theory of law applicable to the facts. *Gentry v. Templeton*, 47 Mo. App. 55.

The defendants are real estate agents, and the plaintiff brought his action to recover from them the purchase money for certain real estate. It was alleged in the petition that the defendants sold the property as the *agents of the plaintiff*, and that they had collected the purchase money and had refused to pay it to plaintiff.

There was evidence tending to show the following facts: The plaintiff is a colored man. One Ben Glass, also colored, who was unknown to the defendants, represented to them that he was William Kelly, the owner of certain property in the city of St. Louis, and that he desired the defendants to find a purchaser for the property at the price of $600. A purchaser was found, who agreed to pay the price asked. In order to consummate the fraud, Glass represented to the plaintiff that the property had been sold for $900, and that Charles Vogel, whom the plaintiff had employed to sell it, had made the sale. The plaintiff, believing this to be true,

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executed the deed and permitted Glass to take possession of it. Glass delivered it to the defendants, who in turn delivered it to the purchaser. Some months previous to this, Glass and wife, personating Kelly and wife, had executed and acknowledged a deed of trust on the same property to secure the sum of $200 borrowed by Glass from one Lewis. This deed of trust was of record, and at the date of the sale the debt secured amounted to $204. The defendants, in closing the trade, applied the purchase money first to the discharge of the incumbrance. The commissions and some taxes were then deducted, and for the remainder the individual check of the defendants for $353, payable to the order of William Kelly, was delivered to Glass. Glass forged the indorsement of plaintiff on the check, and the bank paid to him the money. Upon the foregoing state of facts the court, sitting as a jury, found that the sum of $153 was due the plaintiff, for which, with interest thereon from the date of the institution of the suit, a judgment was entered. The defendants alone have appealed.

It clearly appears that Glass, in the first instance, was not authorized to employ the defendants to sell the property. However, the plaintiff in this action has elected to ratify this unauthorized act of Glass, thereby concluding himself as to all acts of either Glass or the defendants within the scope of the agency.

It may be remarked in the outstart that the fact, that the defendants were deceived as to the true identity of Glass, can make no difference. They were bound to know that he was Ben Glass and not William Kelly. With this idea kept in view the case will be relieved of some of its apparent difficulties.

As the representative of Kelly, Glass had the right to agree with the defendants concerning the selling price

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of the property, and whether it should be sold for cash or on a credit. The agency of Glass also carried with it the right to settle with the defendants for the purchase price, provided it was paid in the usual course of business. *Buckwalter v. Craig*, 55 Mo. 71; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 89; *Greenwood v. Burns*, 50 Mo. 52. Under these authorities the delivery of the check to Glass must be considered a valid payment of a portion of the purchase money, as it is undisputed that the check was good, and that this was the usual way of transacting business. The defendants are not chargeable with the subsequent criminal act of Glass, by which he was enabled to cash the check and convert a portion of his principal's money to his own use. But we do think that the defendants, in withholding and applying a portion of the purchase money to the payment of the forged deed of trust, acted at their peril. This act of theirs was outside of the scope of the general employment. Before applying the money of their principal in any such way, they were bound to have his authority. It is not true, as contended, that the plaintiff admitted that he had received the money which Glass borrowed from Lewis. A careful reading of the record will show this to be an erroneous deduction from the plaintiff's testimony. He admitted that he received $200, *a portion of the purchase money*, and in the same connection he stated that this amount was *all* that he had ever received on account of the property. He also testified that he had no knowledge or information of the fraudulent deed of trust when it was given, and that he learned of it for the first time when he called on the defendants for a settlement. There is nothing in the record to contradict this.

We, therefore, hold that there was evidence tending to show a liability on part of defendants for the sum of $204, the amount of the fraudulent incum-

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brance, and, as the judgment was for considerable less, they have no room for complaint.

With the concurrence of the other judges the judgment will be affirmed. It is so ordered.

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## THE BREMEN BANK, Appellant, v. HERMANN UMRATH *et al.*, Respondents.

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**St. Louis Court of Appeals, November 7, 1893.**

1. **Appointment of Special Judge of Circuit Court Under Act of 1891.** The act of 1891 (Session Acts, p. 113), providing for the appointment of a special judge of a circuit court when the regular judge is laboring under a temporary disability, applies to the circuit court of the city of St. Louis.

2. ———: DETERMINATION BY SPECIAL JUDGE OF MOTION FOR NEW TRIAL OF CAUSE TRIED BEFORE THE REGULAR JUDGE. A special judge appointed under that act has the power to act on a motion for the new trial of a cause tried before the regular judge, and to sustain it for the reason that under the circumstances he cannot dispose of it upon its merits. A mere protest against his hearing of the motion will, therefore, not render his action in this regard erroneous; but whether it would have been so, had the objection been supported by affidavits, showing a likelihood of an early return of the regular judge to the bench, is not decided.

3. **Motion for New Trial:** EFFECT, WHEN NOT FILED BY ALL OF THE DEFENDANTS AGAINST WHOM JUDGMENT WAS RENDERED. When all of the defendants against whom a judgment was rendered do not join in a motion for new trial, and their liability is several and not dependent upon the same conditions, as where it is against one as the maker and others as the endorsers of a note and the former does not join in it, it is error to sustain the motion as to all of the defendants.

4. **Pleadings:** DEFAULT. The answer of one defendant to a petition against several applies to a subsequent amended petition, which does not change the effect of the original petition as to him; hence his failure under these circumstances to plead to the amended petition does not put him in default.

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*Appeal from the St. Louis City Circuit Court.*—Hon. John A. Harrison, Special Judge.

Reversed and remanded.

*Lubke & Muench*, for appellant.

(1) The act of 1891 is not applicable to the city of St. Louis. Constitution, art. 6, sec. 27, Revised Statutes, 1889, secs. 14, 15 and 16. *State ex rel. v. Smith*, 44 Mo. 112. If one of the judges of the circuit court of that city is incapacitated from acting, one of the other judges of that court can sit in his place. (2) That act did not invest the special judge in the case at bar with the power to act upon the motion for new trial. *Gale v. Michie*, 47 Mo. 328, *Allen v. Snyder*, 82 Mo. 256; *Meyer v. Yocum*, 15 Mo. App. 579; *Givens v. Van Studdiford*, 86 Mo. 150; *Voullaire v. Voullaire*, 45 Mo. 608. But if he had that power, his reason for granting the new trial was insufficient. Revised Statutes, 1889, sec. 2241; Session Acts, 1891, p. 70; *State ex rel. v. Adams*, 84 Mo. 310. (3) The court erred in setting aside the entire judgment. Umrath, the third defendant, made no motion that the judgment be set aside to him. Revised Statutes, 1889, sec. 2207; *State ex rel. v. Adams*, 84 Mo. 310; *Hunt v. Railroad*, 89 Mo. 607.

*O. B. Givens* and *Christian & Wind*, for respondents.

(1) "A party has the same right to have his motion for a new trial heard and duly considered as he has to institute or defend an action." *Woolfolk v. Tate*, 25 Mo. 597. As no judge but the one who presided at the trial could pass upon the issues raised by the motion for a new trial, it was the duty of the judge who succeeded the trial judge to set aside the

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verdict and order a new trial. *Woolfolk v. Tate*, 25 Mo. 597; *Cocker v. Cocker*, 56 Mo. 180; *State v. Boogher*, 3 Mo. App. 448. (2) When Judge Withrow announced to the governor that he was unable by reason of illness to discharge his duties as judge, he ceased to have any control or authority or jurisdiction over the motion for a new trial, and the appointment of Judge Harrison by the governor under the act of March 18, 1891, vested in him all the duties as well as the powers of judge of that court. Session Acts, 1891, p. 113; *Lancy v. Barrett*, 75 Mo. 469. (3) Although Judge Harrison might have obtained a transcript of the evidence, that would not have put him in a position to say whether the verdict was against the evidence or the weight of evidence The manner and appearance of the voice, gestures and the looks of each witness are lost to him, and frequently have a material weight with the circuit judge in determining his course. *Vaughan v. Montgomery*, 5 Mo. 532; *McAfee v. Ryan*, 11 Mo. 365, 366. (4) None of the other judges of the St. Louis circuit court have any power to pass upon the motion. *Voullaire v. Voullaire*, 45 Mo. 607, 608. (5) The act of March 18, 1891, applies to the city of St. Louis, and Judge Harrison was therefore judge *de jure* of the circuit court. Session Acts, 1891, p. 113; Revised Statutes, 1889, sec. 6570, clause 19. But even admitting all that appellant argues against the act of 1891, Judge Harrison was judge *de facto*, and as such his acts were binding and cannot be attacked collaterally, or by private individuals at all. *Simpson v. McGonegal*, 52 Mo. App. 540; *Wilson v. Kimmel*, 109 Mo. 260, and cases cited in both.

Bond, J.—This appeal was taken from an order granting a new trial herein made by Special Judge Harrison for the reasons set out in the order sustaining the same, to-wit: "Not having heard

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the evidence in the case, and not being advised therein and being unable to pass upon the merits of said motion, it is therefore ordered by the court that the motion for a new trial herein be sustained, and that the judgment rendered on the sixteenth day of January, 1892, be set aside and for naught held and esteemed. To the action sustaining said motion the plaintiff then and there also duly excepted and in due time presented this bill of exceptions, which is now signed, sealed and ordered filed in and made a part of the record of this cause, this fourteenth day of January, A. D. 1893.

"JOHN A. HARRISON,
"Judge."

The motion for new trial thus disposed of had been argued in March, 1892, before Judge WITHROW, the regular judge of the court, and taken under advisement by him but not decided. In November, 1892, he in writing, supported by his physician's certificate, "did certify to the Governor of the state of Missouri that owing to continued sickness he, the said Withrow, was then unable to discharge the duties of his said office, and that he expected not to be able to resume the said duties until March or April, 1893; that thereupon the governor did, under the act of the General Assembly of Missouri, approved March 18, 1891, empowering the governor to appoint special circuit judges, on December 6, 1892, appoint Hon. John A. Harrrison special circuit judge" during the inability of the regular judge. Under this commission Special Judge Harrison qualified on December 7, 1892, and thereupon ordered the docketing for hearing by him of all motions not disposed of by Judge Withrow. Pursuant to said order this motion for new trial was docketed. "Thereupon said Hon. John A. Harrison did call said motion for hearing, but the plaintiff by its counsel objected to and pro-

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tested against said action and proposed hearing, and did insist that said motion could properly and legally be determined only by the said Hon. James E. Withrow; but the said Hon. John A. Harrison overruled said protest and objection, to which action the plaintiff then and there duly excepted. And the said Hon. John A. Harrison, on January 4, 1893, did order that said motion for a new trial be sustained for *the reasons recited* in the record of said order." The judgment was set aside as to all the defendants, although one of the defendants, Umrath, did not join in the motion for new trial.

The first point raised by the appellant is as to the applicability of the act of March 18, 1891 (relating to special judges), to the St. Louis city circuit court. There is nothing in the language of the act (Session Acts, 1891, p. 113) which excludes from its operation an appointment made within its terms in the city of St. Louis. The power of the general assembly to legislate over the city and county of St. Louis is expressly reserved in the constitution. *Ewing v. Hoblitzelle*, 85 Mo. 64; Constitution of Missouri, art. 9, secs. 23 and 25. The city of St. Louis is one of the judicial circuits of the state, (eighth judicial circuit). See Constitution of Missouri, art. 9, sec. 24, and Revised Statutes, 1889, secs. 3338, and 6570, clause 19.

The act of March 18, 1891, section 1, is as follows, to-wit: "Whenever the judge of *any* circuit or criminal court already elected in this state," etc. Section 2. "In *all* circuits of this state, when a judge has been appointed as provided in next preceding section," etc. Section 3. "The business in the courts of some of the counties of this state is such as to create an emergency," etc. "Therefore this act shall take effect and be in force from and after its passage."

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These provisions demonstrate that the law in question is applicable to *all* the judicial circuits in the state, and therefore embraces the circuit court of the city of St. Louis which is by law one of the judicial circuits of the state. Nor is this conclusion affected by the use of the term "counties" in the last section of the act, since the use of this term in general statutes is held to embrace the city of St. Louis, unless contrary to their "evident intent," or "some law specially applicable to such city." Revised Statutes, 1889, section 6570, clause 19, *supra*.

We, therefore, hold that the appointment of a special judge for the circuit court of the city of St. Louis, as shown by the record in this case, constituted him judge *de jure* during the term for which he was commissioned, and that the objections of appellant on this score are hypercritical and unsound.

Nor do we think there is any force in the contention of appellant, that the special judge had no power to act on matters "which had been tried or heard and taken under advisement" by the regular judge. During the sickness of the regular judge, the special judge was invested with full control and authority over the business of the court where he presided. Whether or not he erred in his rulings or judgments may be shown in the appellate courts, but his power to act during the interim for which he was appointed was the same as that of a regular judge. Session Acts, 1891, p. 113, sec. 1.

This distinction presents the controlling question in this case. Did the special judge commit reversible error in his ruling sustaining the motion for new trial under the facts shown in this record? The plaintiff claims that the action of Judge Harrison in calling up the motion against its protest, and sustaining it not on its merits but for causes not set out in the motion, was

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reversible error. Had the plaintiff moved for a continuance of the motion for new trial supporting his motion for continuance with the proper affidavits touching the probability of the speedy return of Judge Withrow to the bench, we would be in a position to review the propriety of Judge Harrison's action in not continuing the motion. The record, however, presents the naked question of the power of Judge Harrison to pass on the motion, and we are all agreed that he had such power, and that, while the reason assigned by him does not verbally coincide with the rule laid down by the supreme court in *Woolfolk v. Tate*, 25 Mo. 597, and *Cocker v. Cocker*, 56 Mo. 180, it sufficiently appears that he was actuated by the same motives in awarding a new trial, which under the rule laid down in these cases should actuate a judge thus situated.

But we are all of opinion that the judge erred in vacating the entire judgment against all the defendants. Hermann Umrath, one of the defendants, did not appear at the trial and filed no motion for a new trial. Against him the judgment was a finality. His liability was not dependent on the same facts as that of the other defendants. He was the maker of the note, and whether the facts stated in the answer of the other defendants were true or not was immaterial to him, and amounted to no defense for him. Had the court vacated the judgment as to the other defendants only, the plaintiff might have dismissed as to them and still retained its judgment against Umrath, because the liabilty of the defendants was not joint but several.

This error of the special judge we have the power to correct either by a proper judgment in this court, or by reversing his ruling and remanding the cause. We have concluded to adopt the latter course in order that the motion for new trial may be disposed of on its



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merits by Judge Withrow who has since returned to the bench. By this disposition of the matter a retrial of the cause (the trial of which as the record shows lasted for five days) may possibly be avoided. The judgment awarding a new trial is accordingly reversed, and the cause remanded. All the judges concur.

### ON MOTION FOR REHEARING.

ROMBAUER, P. J.—The defendants claim that the trial court did not err in setting aside the judgment as to Hermann Umrath, because he was in default, and the jury were not sworn to inquire into the damages as to him, but were sworn to try the issues between the plaintiff and *all* the defendants, as if the defendant Umrath had also presented an issue. This claim rests upon a misconception of the record. The defendant Umrath had answered the original petition of plaintiff by way of general denial. That answer was on file when the cause was tried. After his answer was filed the plaintiff amended its petition, but the amended petition did not charge Umrath in any other capacity then the original petition did, hence there was no necessity of his filing any other answer to the amended petition than the one he had already filed. As long as that answer was on file and raised an issue no default could be taken against him. *Cox v. Capron*, 10 Mo. 691.

The motion is overruled. All concur.

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## Bank of Little Rock, Appellant, v. Charles S. Fisher *et al.*, Respondents.

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**St. Louis Court of Appeals, November 7, 1893.**

**Trover:** RIGHT OF ACTION BY MORTGAGEE. An action of trover cannot be maintained by one who has neither the right of property in the chattel alleged to have been converted, nor the right of possession; and neither of said rights follows from the mere fact that the plaintiff is a mortgagee of the chattel before condition broken.

*Appeal from the St. Louis City Circuit Court.*—Hon. Daniel Dillon, Judge.

Affirmed.

*Harvey & Hill* for appellant.

*Nathan Frank* and *Chas. W. Bates* for respondents.

Rombauer, P. J.—This is an appeal from a judgment rendered upon a general demurrer to plaintiff's petition, and the only question presented for our consideration is, whether the petition states facts sufficient to constitute a cause of action.

Such parts of the petition as are deemed of special importance by the parties are set out literally; other parts are set out in substance only. The facts stated are as follows: The defendant sold some machinery to one, Thomas W. Baird, and delivered it to a common carrier in St. Louis, Missouri, taking a bill of lading therefor in the usual form. According to such bill, the machinery was to be transported to Friars Point, in the state of Mississippi, and was there to be delivered to Baird or to his order. Baird becoming insol-

vent, the defendants claimed the right of stoppage *in transitu*, and demanded a return of said property on June 27, 1891, from the carrier, or a connecting carrier at Friars Point, which demand "was not in legal form, and void," and the carrier redelivered the property to the defendants.

Baird, who was in possession of one bill of lading, "sold and delivered said machinery to the Friars Point Planing Mill and Excelsior Manufacturing Company, a corporation or company then domiciled and doing business at Friars Point, Mississippi, and at the time of selling the same to the last mentioned company, the said last mentioned company, in consideration of said sale, executed and delivered to Thomas W. Baird four promissory notes, by which the said last mentioned company bound and obligated itself to pay to said Thomas W. Baird the sum of $893. As security for the payment of said notes, it was agreed by and between said Thomas W. Baird and the said last mentioned company that the title should be reserved by the said Baird until the payment of said notes to said Baird or his assigns, but this was for the only purpose of securing the payment of said notes.

"Afterward, to-wit, on the twenty-sixth day of May, 1891, said Thomas W. Baird, before the maturity of said notes or either one of them, in due course of business, assigned said notes to this bank (the plaintiff) for value received, and this bank has ever since been, and now is, the legal holder of said notes, no part of which has been paid. At the time said Baird sold the machinery to the last named company (the manufacturing company) he indorsed and delivered to said last named company the bill of lading for said machinery, which was then in the custody of the carrier, it being intended that said bill of lading should be, and the same was, a symbolical representative of the

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machinery, and the delivery of said bill of lading was intended to be a delivery of the machinery."

The plaintiff demanded the machinery from the defendants, and, upon their refusal to comply with such demand, brings this suit for its conversion.

Had the petition simply stated that the plaintiff was the owner and entitled to the possession of the property in controversy, and that the defendants wrongfully converted the same to their own use, it would not have been subject to a demurrer. The code in these cases requires only the statement of legal, and not of evidential, facts. But, when the petition purports to state all the evidential facts upon which the plaintiff's cause of action is grounded, it must state them sufficiently to show a cause of action in the plaintiff. A petition is fatally defective, when all the facts stated therein, if true, will not warrant a recovery. *State to use v. Bacon*, 24 Mo. App. 403.

We may concede, for the sake of argument only, however, that the rule established in *Lickbarrow v. Mason*, (6 East, 21; 1 Smith's Leading Cases, part 2, *753, which is adopted in most states of the American union, is the law of this state. That rule is that, where a bill of lading is delivered by the vendor to the vendee, and the vendee assigns the same in *good faith and for value* to a third party while the goods are in transit, the vendor's right of stoppage in the transit is gone. We may also concede, for the sake of argument, that a person may, in the state of Mississippi, reserve a secret lien on personal property which he sells and delivers, and that such lien is assignable and passes to the assignee of the notes taken by the vendor for the purchase money. But, conceding both these propositions, it still leaves the petition fatally defective, because it fails to show any *matured* cause of action at the date of the institution of the suit.

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The question to be decided is not whether the defendants' right of stoppage *in transitu* was gone when they attempted to exercise it, but whether the plaintiff had a cause of action against them when he brought this suit. Conceding that the pledge to the plaintiff was valid, still, it does not appear by the petition that the plaintiff had either the actual or the constructive possession of the property *at any time*, or that it had any right to the immediate possession of the property when it brought this suit. The constructive possession of the property passed to the manufacturing company when Baird delivered the bill of lading to it, and remained in that company, notwithstanding Baird's reservation of title. This reservation, as the petition states, was taken as a security, and constituted Baird a mortgagee at best. The plaintiff, as assignee of that claim, stands in no better position than Baird. The petition does state that the notes taken by Baird and assigned to the plaintiff are unpaid, but it fails to state either directly or inferentially that any part of said debt has matured, which alone could give the plaintiff any right to the immediate possession of the property, even if the transaction in all other respects was valid as against the defendants.

Now, the action of trover cannot be maintained in this state when the plaintiff has neither the right of property in, nor the right of possession to, the chattels alleged to have been converted. *Parker v. Rodes*, 79 Mo. 88; *Myers v. Hale*, 17 Mo. App. 204; *Deland v. Vanstone*, 26 Mo. App. 297. Conceding to the plaintiff everything it claims on other points, the insuperable objection still remains that, according to the statements of its petition, it was, *at best*, a mortgagee of the property before condition broken, and, not being as such entitled to the possession of the property, it

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cannot maintain this action. *Chandler v. West*, 37 Mo. App. 631; *Barnett v. Timberlake*, 57 Mo. 499.

Therefore, without expressing any opinion on the two first points involved in the case, we must conclude that the absence of any averment in the petition, showing that the plaintiff at the date of the institution of the suit had a right to the possession of the property in controversy, renders the petition fatally defective on demurrer. The judgment is affirmed. All the judges concur.

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MORRIS SELZ *et al.*, Respondents, v. T. E. COLLINS *et al.*, Appellants.

**St. Louis Court of Appeals, November 7, 1893.**

1. **Banks:** NEGLIGENCE IN FAILING TO COLLECT DRAFT: LAW AND FACT. Whether conduct amounts to negligence is a question of law, when the facts are not in dispute and but one inference can reasonably be drawn therefrom. This rule is applied to the failure of a bank to either collect a draft received by it for collection, or to notify the drawer of its nonpayment in due time.

2. ——: ——: ——. But whether the drawer, in the case of such negligence on the part of a bank, is entitled to a verdict for the full amount of the draft is held under the evidence in this cause to be a question of fact, dependent upon the probability of the collection of the draft if the bank had used due diligence in pressing the drawee for payment, or in notifying the drawer of the nonpayment of the draft.

3. ——: ——: CUMULATIVE REMEDIES. In the case of such negligence, the drawer can prove his claim against the drawee under an assignment for the benefit of creditors, made by the latter, and collect dividends thereon, and can at the same time pursue his right of action for the negligence of the bank; these remedies are cumulative. Nor need the prosecution of his suit against the bank be delayed to await the outcome of the assignment.

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*Appeal from the St. Louis City Circuit Court.*—Hon. John A. Harrison, Special Judge.

Reversed and remanded.

*Lee & Ellis* for appellants.

(1) The court erred in taking the case away from the jury. Where a *prima facie* case or defense has been made, the same must be submitted to the jury, and a peremptory instruction is error. *Kenney v. Railroad*, 80 Mo. 573–578; *Carson v. Porter*, 22 Mo. App. 179–184; *Cannon v. Moore*, 17 Mo. App. 102; *Berne v. Railroad*, 20 Mo. App. 232. (2) A bank contracts to use due diligence in the business of collection, and it is only bound to use reasonable care and diligence in the discharge of its assumed duties. In a case of doubt, its best judgment is all the principal has a right to require, especially if the doubt arises by reason of the neglect of the principal to give specific instructions; the bank will be acquitted even if its discretion be exercised erroneously. 1 Morse on Banking [3 Ed.], sec. 218; *National Bank v. Merchants' Bank*, 91 U. S. 92, 104. It is not within the scope of the collecting bank's agency to bring a suit upon paper left with it for collection, and this rule is much stronger as to an attachment suit and the furnishing of a bond. *Crow v. Mechanics' Bank*, 12 La. Ann. 692; *Weatheral v. Bank*, 1 Miles (Pa.), 399; 1 Morse on Banking, sec. 246. A bank which is itself a creditor of a debtor, and is also a collector for another against said debtor, has a right to prefer itself out of the deposits in its hands as against the party whom it represents as an agent. *Freeman v. Citizens' National Bank*, 42 N. W. Rep. 632. (3) In this case the burden of proof was upon the plaintiffs to show, not only the acts of neglect complained of, but

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also by reason thereof that the plaintiffs had sustained a specific loss, to wit, the amount claimed. The burden does not shift from the plaintiffs to the defendants, when the former has established an act of neglect, so as to require the defendants to show that the plaintiffs had suffered no loss therefrom. *Fox v. Davenport National Bank*, 73 Iowa, 649; *Sahlein v. Bank*, 90 Tenn. 221; *Stowe v. Bank*, 2 Dev.(N. C.) 408; *Bruce v. Baxter*, 7 Lea, 477; *Van Wart v. Woolly*, 3 B. & C. 439; *Allen v. Suydan*, 20 Wend. 329; *First National Bank v. Fourth National Bank*, 77 N. Y. 320; *In the matter of Cornell*, 110 N. Y. 351, 360; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Hamilton v. Cunningham*, 2 Brock. 350; *Pennington v. Yell*, 11 Ark. 212, 219; *Joy v. Morgan*, 35 Minn. 184. (4) It appears that the assigned estate has not yet been settled or wound up; that plaintiffs have proven up their claim before the assignee; have received dividends both before and since the institution of this suit. There is no proof or presumption that plaintiffs will not be paid in full out of the assigned estate, and therefore there was no evidence to go to the jury in support of plaintiffs' second count. Hence, the instruction that the jury should find in favor of the defendants should have been given.

*Nathan Frank* and *Chas. W. Bates* for respondents.

(1) An agent to collect a draft is liable for failure to follow instructions, whereby loss is occasioned to the principal. *Whitney v. Express Co.*, 104 Mass. 152. *Central Georgia Bank v. Cleveland Bank*, 59 Ga. 667; *National Bank v. City Bank*, 103 U. S. 668; *Butts v. Phelps*, 79 Mo. 302; s. c., 90 Mo. 670. Independent of instructions, a failure on the part of the collecting agent to exercise ordinary diligence renders it liable for

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the loss. *Dyas v. Hanson*, 14 Mo. App. 363; *City National Bank v. Clinton Co. National Bank*, 30 N. E. Rep. 958; *First National Bank v. Fourth National Bank*, 77 N. Y. 320; s. c., 89 N. Y. 412; *Whitney v. Express Co.*, 104 Mass. 152. Independent of instructions, it is the duty of an agent or bank having a draft for collection to notify the owner, within a reasonable time, of its non-payment, so that he may take such steps for the protection of his interests as in his judgment seem proper, and he is liable for loss occasioned by his failure so to do. *Trinidad National Bank v. Denver National Bank*, 4 Dill. 290; *Allen v. Suydan*, 17 Wend. 368, 372; *Sahlein v. Bank of Lonoke*, 90 Tenn. 221; 16 S. W. 373; 3 Sutherland on Damages, p. 25; *Bank of Mobile v. Huggins*, 3 Ala. 206, 212. (2) The measure of damages in this class of cases—in an action against a collecting bank—is the amount which the plaintiff loses by the default of the collecting bank, with interest. The liability of the collecting agent being established, the claim being proved to have been collectible during the time defendants held it and were guilty of breach of duty as agent, and the insolvency of the drawee, the only party on the draft, being shown, the owner of the draft is entitled to judgment for the full amount of the claim, with interest from the time the cause of action accrued. *Dyas v. Hanson*, 14 Mo. App. 363; *National Bank v. City Bank*, 103 U. S. 668; *Trinidad National Bank v. Denver National Bank*, 4 Dill. 290; *First National Bank v. Fourth National Bank*, 89 N. Y. 412; *Fahey v. Fargo*, 17 N. Y. Sup. 344; Mechem on Agency, sec. 518; 1 Daniel on Negotiable Instruments, sec. 329; 3 Sutherland on Damages, pp. 16 to 30, and cases cited. (3) Where the facts are undisputed, the liability of the collecting bank or agent is a question of law for the court. *Dyas v. Hanson*, 14 Mo. App. 363, 369, 370; *Fahey v. Fargo*, 17 N. Y. Sup. 344; *Allen v. Suydan*, 17 Wend.

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368, 372; *State ex rel. v. Hall*, 45 Mo. App. 298, 303; *Matthews v. Loth*, 45 Mo. App. 455, 459; *Trinidad National Bank v. Clinton Co. National Bank*, 30 N. E. Rep. 958; *Murphy v. Railroad*, 21 S. W. Rep, 862, 863; *St. Nicholas Bank v. State National Bank*, 128 N. Y. 26.

ROMBAUER, P. J.—The substantial question arising upon this appeal is, whether the trial court erred in directing the jury to return a verdict for the plaintiffs for the balance due upon a certain bill of exchange to the plaintiffs from one Wetzel.

The petition of the plaintiffs states the following facts· The plaintiffs are merchants in Chicago, Illinois, and the defendants are bankers in Fort Benton, Montana. On the fifteenth day of October, 1883, the plaintiffs sent to the defendants for collection a draft drawn on Wetzel for $2,032.25, payable one day after sight. The defendants undertook for a valuable consideration to collect said draft. The draft was presented to Wetzel by defendants, and accepted by him. On the twenty-seventh day of October, 1883, the defendants collected of Wetzel in part payment of said draft $1,016.13, which amount they remitted to the plaintiffs. The plaintiffs had reason to rely, and did rely, upon the defendants' judgment, skill and care for the collection of the balance, and by the exercise of ordinary care and diligence on the part of the defendants the balance of said draft could have been collected of Wetzel. After the defendants received said draft, Wetzel became insolvent and so remained. The defendants knew, or by the exercise of ordinary care might have known, of Wetzel's financial condition, but failed and neglected to use ordinary care to secure for plaintiffs the balance due on said draft, whereby the same was lost to the plaintiffs, with the exception of $325.37 paid to them by the

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assignee of Wetzel. The petition winds up with a prayer for judgment.

The answer of the defendants denied generally the facts stated in plaintiffs' petition, and then states in substance the following: It admits that the defendants received the draft for collection with instructions that, if Wetzel would make a reasonable payment upon it, to hold the draft for ten days for payment of the residue. They presented the draft to Wetzel at its maturity, obtained from him payment of one-half, and gave him twenty days wherein to pay the residue. Thereafter, on December 4, they received instructions from the plaintiffs to urge the payment of the balance, which they did, but Wetzel refused to pay it. Wetzel afterwards made an assignment for the benefit of his creditors, and the plaintiffs proved up their claim and received dividends to the amount of $600. The answer sets up the proof by the plaintiffs of their claim before the assignee in bar of this action. The plaintiffs took issue on the answer by reply.

The plaintiffs gave evidence tending to substantiate the facts stated in their petition. It appeared from the plaintiffs' own evidence that, when they sent the draft for collection to the defendants, they stated in their letter: "If he (Wetzel) will make a reasonable payment at maturity, please make returns, and hold for ten or twenty days for collection of balance." To this letter the defendants replied: "Yours of 15th inst. is at hand, enclosing draft for $2,032.25 against W. S. Wetzel. He, to-day, paid us on same one-half, and agrees to pay balance in twenty days. We hand you our St. Louis draft for same." October 27, 1883.

It appeared from the defendants' evidence that the one-half of the draft, which they remitted to the plaintiffs, was money advanced by them for Wetzel, and that Wetzel was at the time overdrawn in the bank of

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the defendants where he kept his accounts, and continued to be so overdrawn until December 13, when he made an assignment for the benefit of creditors. It also appeared that, when the plaintiffs, under date of November 27, wrote to the defendants to urge the payment of the balance of draft, the defendants exhibited the letter to Wetzel, who thereupon requested them to honor his check upon their bank for the residue of the draft, which the defendants declined to do on the ground that he was then overdrawn.

It also appeared from the defendants' evidence that, from the date of the receipt of the draft until date of Wetzel's assignment, he was constantly overdrawn on the bank, his overdrafts varying between $567 and $6,820, and being on the majority of days over $5,000; also that Wetzel's indebtedness to the defendants on other matured obligations at the date of the receipt of the draft by them was $5,888, and increased from that time on continually up to the date of his assignment, when it reached the figure of $35,036. It further appeared from the plaintiffs' evidence that, under the laws of Montana, an attachment suit may be brought on all matured obligations upon contracts, expressed or implied, for the payment of money, provided the plaintiff gives bond. It also appeared that the defendants, upon being advised that Wetzel was about to make an assignment, instituted an attachment suit against him for $25,000, which amount they realized *in full;* that the defendants were preferred creditors in the assignment to the amount of $6,000, and were fully secured on the residue of $4,000 not included in the attachment or assignment.

As to Wetzel's financial condition between the date when defendants received the draft, and the date of the assignment, the evidence is conflicting. He himself states the real value of his assets as greatly in excess of

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his liabilities, but as likely to be sacrificed by the assignee. That he was embarrassed during the entire interval, and in a commercial sense insolvent, under our definition of that term in *Ring v. Paint Co.*, 44 Mo. App. 111, all the testimony concedes.

The rule, that the question of negligence is ordinarily a question for the jury, means that it is so when the facts are either disputed or, if conceded, admit of different inferences by reasonable men. The proper conclusion to be drawn from a conceded state of facts, admitting of but one reasonable inference, is always a question of law, and the question of negligence is no exception to the general rule. *Boland v. Railroad*, 36 Mo. 484; *Callahan v. Warne*, 40 Mo. 131; *Bell v. Railroad*, 72 Mo. 50; *Mauerman v. Siemerts*, 71 Mo. 101. In applying this rule to negotiable paper, it has been held that what amounts to due diligence in making demand or giving notice of dishonor, where the facts are conceded, is a question of law for the court. *Collins v. Warburton*, 3 Mo. 202; *Wilson v. Huston*, 13 Mo. 146; *Linnville v. Welch*, 29 Mo. 203; *Sanderson's Adm'r v. Reinstadler*, 31 Mo. 483; *Fugitt v. Nixon*, 44 Mo. 295; *Dyas v. Hanson*, 14 Mo. App. 363; *Martin v. Grabinsky*, 38 Mo. App. 366. The first question, therefore, for us to determine is whether under the *conceded facts* the court was justified in declaring as a matter of law that the defendants were guilty of negligence in not notifying the plaintiffs, after the expiration of the twenty days, that the residue of the draft remained unpaid.

The letter of introduction sent by the plaintiffs to the defendants with the draft admits of but one interpretation. It authorized the defendants to hold the draft for twenty days after maturity for the collection of the balance, and no longer. If, at the expiration of the twenty days the balance of the draft was not paid,

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it became the defendants' duty to either notify the plaintiffs at once of that fact, or return the draft to them. The extended time, according to defendants' evidence, expired November 16, 1883, and the first information given by the plaintiffs to the defendants of the fact that the residue of the draft was not paid, was under date of December 17, and was to the effect that Wetzel had made an assignment, and that the defendants had handed the draft of plaintiffs to an attorney. No excuse is shown for this delay, nor can we see what excuse could be shown. We hold that, under the conceded facts, the defendants were guilty of negligence in this matter, and that the court committed no error in instructing the jury to find for the plaintiffs.

The next question is, whether the court was justified in declaring, without qualification, that the measure of the damages of the plaintiffs consisted of the unpaid residue of the draft.

On this branch of the case the defendants maintain that the exhibition of plaintiffs' claim to, and its allowance by, Wetzel's assignee bars the action against the defendants; next, that, until the close of the assignment, there can be no judgment for a definite amount against the defendants; and, thirdly, that the question of the extent of the loss of the plaintiffs as a natural and probable result of the negligence of the defendants, is a question which should have been submitted to the jury.

The first proposition must be ruled against the defendants, both on principle and authority. That question goes to the plaintiffs' right of recovery, and not to the measure of their damages. If the plaintiffs have a cause of action against the defendants, it is no answer to say that they have also a cause of action against Wetzel and are pursuing it. Whatever the plaintiffs have or may recover from the assignee is to

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be credited to the defendants. *Trinidad Bank v. Denver Bank*, 4 Dillon, 290; *National Bank v. City Bank*, 103 U. S. 668, 672. Some cases hold, and, with reason, we think, that, where the liability of the bank springs from a contractual relation, it will, under the circumstances above shown, upon payment of the loss, be subrogated to the rights of the holder of the draft. But, whether this be so or not, we are not aware of any decision which holds that the plaintiff in a case of this character is bound to exhaust his remedy against the acceptor before he can recover substantial damages from his negligent agent.

This brings us to the last and most serious question in the case, namely: Assuming that the defendants were negligent, is the question whether the plaintiffs suffered loss by such default to the face value of the draft a question of law or of fact?

In order to justify a recovery, as a matter of law, for the entire amount of the draft, it was incumbent upon the plaintiffs to show that the entire loss was due to the default of the defendants, and that, but for such default, the loss would not have happened. *Allen v. Suydan*, 20 Wend. 329; *First National Bank v. Fourth National Bank*, 77 N. Y. 320, 330. Cases may arise where the existence of these two conditions are shown by the evidence to be so *certain* that the question resolves itself into a mere question of law; but where, under the evidence, they are merely more or less *probable*, the question must remain one of fact for the jury under our system of judicial procedure. In this case it was for the jury to say under the evidence whether, if the defendants had used due diligence in pressing Wetzel for payment of the residue, he would probably have paid it, or whether, if defendants had notified plaintiffs of the nonpayment, or returned the draft on November 16, the plaintiffs could probably

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have secured its payment by Wetzel, notwithstanding his insolvent condition. Had the cause been submitted to a jury on appropriate instructions, a verdict for the plaintiffs for the full amount of the draft, less credits for money received from the assignee, would have been well supported by the evidence.

The cases cited by plaintiffs in opposition to this view are not in point. In *Whitney v. Express Co.*, 104 Mass. 152, the agent neglected to present a draft for payment, although, as the case finds, the *drawees were ready to pay it.* The drawees became insolvent before demand. It does not appear on what instructions the case was submitted to the jury, but the plaintiffs secured a verdict for the full amount in the trial court, and the supreme court simply held that the loss *was wholly due* to defendant's neglect and must be borne by them. The case of *Trinidad Bank v. Denver Bank*, 4 Dillon, 290, was one of the failure to present a draft for payment, and *it was conceded that the draft would have been paid, if presented in time.* It was not presented, and the drawee failed. Judge DILLON held that the measure of damages was the amount of the draft. In *Dyas v. Hanson*, 14 Mo. App. 363, the question was submitted to the jury, in appropriate instructions, whether the draft could not be collected *in consequence of a failure to present it within a reasonable time.* The only case which seems to have any bearing is *Fahy v. Fargo*, 17 N. Y. Sup. 344, where the court held that, where it is *reasonably probable* that the draft would have been paid if defendant had done his duty, he is *prima facie* liable for the whole amount of the draft. In that case the referee found an absence of a reasonable probability, and his finding was reversed by the supreme court; but whether the reversal was had because the court found that the referee erred in his finding of facts, or in his findings of law, does not clearly appear.



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We must conclude that the last proposition above stated should have been submitted to the jury, and that, in taking it away from them by a peremptory instruction, the court committed error prejudicial to the defendants.

The judgment is reversed and the cause remanded. All the judges concur.

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STATE *ex rel.* J. W. KERR, Respondent, *v.* PATRICK SHEEHAN, Appellant.

**St. Louis Court of Appeals, November 7, 1893.**

**Justices' Courts:** SETTING ASIDE DEFAULT: COMPUTATION OF TIME. If the ten days, allowed by statue for the filing of a motion to set aside a judgment by default in a justice court, should expire on a Sunday, the motion must be filed before that day.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*Lubke & Muench* and *Geo. W. Lubke, Jr.*, for appellant.

A judgment by default rendered by a justice of the peace may be set aside by him, provided application therefor be made within ten days after the rendition of the judgment. Revised Statutes, 1889, sec. 6237. In the computation of the time during which an act may be done, the first day is excluded and the last day included. If the last day be Sunday, it is also excluded or omitted in the computation. The tenth day for doing an act after a given Thursday is the second Monday thereafter. *Gribbon v. Freel*, 93 N. Y. 93; Revised Statutes 1889, sec. 6570 (vol. 11, p. 1541); *Dorsey v. Pike*, 46 Hun, 112; *Porter v. Pierce*, 43 Hun,

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11; *Gage v. Davis*, 129 Ill. 236; *Muir v. Galloway*, 61 Cal. 498; *Carothers v. Wheeler*, 1 Ore. 194; *Spencer v. Haug*, 45 Minn. 231; *Johnson v. Merritt*, 52 N. W. Rep. 863.

*Henry B. Davis* and *W. W. Cohick* for respondent.

In computation the first day is to be excluded and the last day included; but, if the last day fall on Sunday, it, too, shall be excluded, showing that the act then must be performed on the previous Saturday. *Patrick v. Faulke*, 65 Mo. 312-314, and cases there cited.

Biggs, J.—The defendant is one of the justices of the peace of the city of St. Louis. On the nineteenth day of January, 1893, he entered a judgment by default in a cause then pending before him, in which the relator was plaintiff and the St. Louis car company was the defendant. On the thirtieth day of the same month the defendant in that action filed a motion to set aside the judgment, which motion the defendant justice sustained. The present action was begun in the circuit court by a petition for *mandamus* upon appellant to show cause why the said order setting aside the judgment should not be annulled. The ground of the complaint was that the motion was not filed within ten days after the rendition of the judgment. The defendant, in his return, admitted the facts, but justified his action on the ground that the tenth calendar day after the judgment was entered was Sunday, and that, under a proper construction of the statute concerning the computation of time, when the last day for doing the act falls on Sunday, the act may be done on the following Monday. The court sustained a demurrer to the return, and, the defendant refusing to plead further, the order setting aside the judgment against the car wheel com-

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pany was annulled and for naught held, and the costs of the present proceeding ordered to be taxed against the defendant. From that judgment the defendant has appealed.

The statute (section 6237, Revised Statutes, 1889) provides: "Every justice of the peace shall have power, on the application of the party aggrieved, or his agent, and for good cause shown, to set aside the judgment of nonsuit and by default above directed, upon the payment of all costs then accrued. Every such application shall be made *within ten days*, or twenty days if the party be a nonresident of the state, after the rendering of the judgment," etc.

Was the defendant's return good as a matter of law? The inquiry involves the construction of the *fourth* clause of section 6570 of the Revised Statutes of 1889, promulgating additional rules for the construction of statutes, which clause reads: "The time within which an act is to be done shall be computed by excluding the first day and including the last, *if the last day be Sunday it shall be excluded.*"

In the case of *Patrick v. Faulke*, 45 Mo. 312, the supreme court with some hesitation held that, when the last day within which a statute prescribed that an act should be done fell on Sunday, such act must be performed on the previous Saturday. It is argued that this decision is not controlling authority in the present action, because the supreme court had under consideration the mechanics' lien act, which at that time was construed strictly. It was said in the opinion in that case that, although the mechanics' lien law was highly favored, yet it gave extraordinary rights to the mechanic or material man, and that, for a party to avail himself of its advantages, he must bring himself strictly within its terms. So, in this case, the ten days allowed for filing a motion to set aside a judgment of nonsuit or

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default are days of grace merely, and the party who seeks the privilege which the law thus affords must bring himself within the strict letter of the act.

Holding, as we do, that the decision of the supreme court in the *Patrick case* is applicable to and decisive of this case, we must affirm the judgment. All the judges concur.

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## Hugh White, Respondent, v. Isaac Lowenberg, Appellant. 55 69 | 57 162

**Kansas City Court of Appeals, November 20, 1893.**

1. **Instruction:** WITNESS SWEARING FALSELY: MATERIAL FACT. An instruction telling the jury if they believe any witness has willfully sworn falsely they are at liberty to disregard the whole of his testimony, is fatally faulty in not confining the false swearing to a material fact.

2. ——— : ——— : DISCRETION OF COURT. Instructions calling attention to the veracity of witnesses are not favored by the courts, and the propriety and necessity is left largely with the discretion of the trial courts, and when given they should be drawn so as to confine their application to material facts.

*Appeal from the Buchanan Circuit Court.*—Hon. Henry M. Ramey, Judge.

Reversed and remanded.

*Ryan & McDonald* for appellant.

The court erred in giving plaintiff's first instructions as to credibility of witnesses. This class of instructions is never proper in such cases as the one at bar. The most that could be said in reference to the testimony of defendant Lowenberg, against whom the force of said instruction was directed, was that it was in contradiction to that of another witness, who was an attor-

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ney for plaintiff. Our courts have said that such instructions ought not to be given in such cases. *State v. Cushing*, 29 Mo. 217; *State v. Stone*, 31 Mo. 406; *Bank v. Murdock & Armstrong*, 62 Mo. 74; *White v. Maxcy*, 64 Mo. 559. Even though such instructions could be considered as proper in this case, yet the instruction as given is fatally defective in failing to state that the jury in order to disregard a witness' testimony must believe "that he willfully swore falsely to a material fact in the case."

*Charles F. Strop* for respondent.

The case was fairly presented to the jury, but if there is any error in the record upon a view of the whole case, it is manifest that the judgment is for the right party and it should not be reversed, even though error may have intervened. *Bassett v. Glover*, 31 Mo. App. 150; *State to use v. Benedict*, 51 Mo. App. 651.

ELLISON, J.—This action is on an account for work and labor in building a wall. Plaintiff recovered, and defendant appealed. There was contradictory testimony at the trial—each party having evidence tending to support their respective contentions. The court gave, at the instance of plaintiff, the following instruction to the jury: "The court instructs the jury that they are the sole judges of the weight of the evidence and the credibility of the witnesses, and if they believe that any witness has willfully sworn falsely, they are at liberty to disregard the whole of his testimony."

It will be noticed that this instruction fails to limit the false testimony to any substantial or material fact in the case. It authorizes the jury to disregard the entire testimony of any witness whom they may believe has sworn falsely as to any statement he may have

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made, whether it may be some matter properly in the case and affecting its decision, or some matter which may have been inadvertently or improperly drawn out.

Instructions of this nature are not looked upon with much favor by the courts (*Iron Mountain Bank v. Murdock*, 62 Mo. 74), yet their propriety or necessity in the given case is left largely with the discretion of the trial court. *White v. Maxcy*, 64 Mo. 559; *State v. Hickam*, 95 Mo. 332. But, when asked in cases where the court deems it proper to give them at all, they should not be drawn so as to suggest to the jury that they might disregard the entire testimony of a witness who had sworn falsely as to some trivial matter, possibly disconnected from the case. The instruction as given in this case is so wide a departure from the form in which such instructions have been approved that we feel constrained to disapprove it.

Of the remaining objections it is sufficient to say, after a careful examination, that we think there was evidence sufficient to support the verdict. Nor do we approve of the view presented by the appellant as to the other instructions. The court's action as to them we believe to be correct.

For the error mentioned, the judgment will be reversed and the cause remanded. All concur.

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## E. H. Steckman, Appellant, v. E. M. Harber *et al.*, Respondents.

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**Kansas City Court of Appeals, November 20, 1893.**

1. **Equity:** MAXIM: CONDUCT OF PLAINTIFF. The maxim, "He who seeks equity, must do equity," applied to the facts of this case and the conduct of plaintiff in concealing a trustee's sale from the defendants to get even with one of them on account of another trade, results in the affirmance of a decree requiring the plaintiff to convey certain land to the defendants before he can have judgment against them on certain notes.

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2. **Deposition**: NOT SIGNED BY WITNESS: WAIVER. **Where the signing of a deposition is waived at the close of the finding, this is sufficient to authorize its use at the trial.**

*Appeal from the Grundy Circuit Court.*—HON. G. D. BURGESS, Judge.

AFFIRMED.

*Geo. Hall* for appellant.

(1) There was no finding to support the judgment of the court. While the trial court was not bound to state separately its findings of the facts, it was required to state its findings generally, and having failed so to do the judgment is erroneous. Revised Statutes, 1889, sec. 2135; *Jordan v. Buschmeyer*, 97 Mo. 94. (2) The instrument read in evidence purporting to be the deposition of Fred. G. Grantham was not signed by him, as required by section 4455 of Revised Statutes, 1889, and was inadmissible and incompetent as evidence; and the statement in the notary's certificate that the parties waived the signing of the same does not cure the defect. (3) Defendants were not partners of plaintiff, nor did their relations entitle defendants to notice of the foreclosure of the Grantham deed of trust, nor to a conveyance of the land to them on payment of the notes held as ordered by the court. *Hedges, Batterton & Co. v. Wear*, 28 Mo. App. 575. The defendants had, by their indorsement on the back of the notes, waived notice and demand, and had guaranteed payment, and were not entitled to notice of any proceedings against Grantham or his property. *Mfg. Co. v. Hester*, 71 Mo. 91; *Koenig v. Bramlett*, 20 Mo. App. 636; *Osborn & Co. v. Lawson*, 26 Mo. App. 549. (4) Neither the allegations in defendants' answer nor the evidence entitle the defendants to the relief granted, and the court should have given the first instruction asked by plaintiff. (5) The agreement in regard to the

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release of the Lewis deed of trust on the land sold to Grantham, the execution of the notes and deed of trust by Grantham to defendants and the transfer of the same to Lewis is all in writing, and any evidence as to any contemporaneous parol agreement about the notes to Lewis running, and about defendants being notified when Lewis wanted his money is all irrelevant and incompetent. *State ex rel. Yeoman v. Hoshaw*, 98 Mo. 358; *Pearson v. Carson*, 69 Mo. 550; *Tracy v. Iron Works*, 29 Mo. App. 342. (6) As plaintiff was not a party to the agreement between Lewis, Gates, his attorney, Grantham and defendants about letting Grantham's notes and the Lewis notes run at interest and was not interested in the same only so far as his land was holden as security for the same, he was not bound by any such agreement. And if he had been a party to such agreement it was not founded on a sufficient consideration. *McGlothlin v. Hemry*, 59 Mo. 214 *Garnier v. Papin*, 30 Mo. 246; *Bircher v. Payne*, 7 Mo. 462; *Price v. Cannon*, 3 Mo. 453. (7) Lewis had the right to assign the two Grantham notes, sued on, to plaintiff and Howsman, and they were entitled to them by subrogation when they paid the two notes for which they were held as collateral security and for which plaintiff and Howsman's lands were held. *Allen v. Dermott*, 80 Mo. 56; *Orrick v. Durham*, 79 Mo. 174; *Wolf v. Walters*, 56 Mo. 292; *Brown v. Kirk*, 20 Mo. App. 524. Lewis was the owner of the notes sued on and had the right to sell them. *Beecher v. Buckhorn*, 44 Am. Dec. 580; *Chandler v. Stevenson*, 68 Mo. 450; 1 Parsons on Bills and Notes, 157.

*Harber & Knight* for respondent.

(1) The plaintiff's petition is a straight petition at law. The defendants showed equally as complete a

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defense at law, and these being the admitted facts, the plaintiff could not recover at law. *Furnold v. Bank*, 44 Mo. 340; *Hull v. Sherwood*, 59 Mo. 174; *Bushong v. Taylor*, 82 Mo. 660; *Roberts v. Barlett*, 26 Mo. App. 611–617 (directly in point). (2) The plaintiff then abandons his law petition, and seeks the aid of equity (which he must do) by invoking the equitable doctrine of subrogation, or as it is called, cession, marshaling of assets, or contribution. If he recovers at all, he must recover in equity, and by the aid of equity, and his whole case is in equity, and henceforward he must address himself to its rules and doctrines; and how can he recover or hope to have any standing in a court of equity, when every one of its rules, and every one of its principals of natural justice, which time has crystallized into maxim's meet him at the threshold and scowl at his case. "He who seeks equity, must do equity." *Creed v. Scraggs*, 1 Heisk. 590: *Whelan v. Reilly*, 61 Mo. 569, 570; Story's Equity Jurisprudence, sec. 64, note 2; *Henson v. Keating*, 4 Hare, 1; *Neeson v. Clarkson*, *Id.* 97; *Phillips v. Phillips*, 50 Mo. 603; *Erwin v. Blake & Pet.*, 18; Story's Equity Jurisprudence, sec. 64, and cases cited; 1 Pomeroy on Equity Jurisprudence, 422; *Finch v. Finch*, 10 Ohio St. 501–508; American and English Encyclopedia of Law, vol. 6, p. 707, title 5, note 2. In one breath he asks to be subrogated to his securities, and in the next, when offered all he has paid, refuses Harber and Carnes the right to be subrogated to their securities. This he cannot do. For his prayer is addressed to "a court of conscience, to a court that touches nothing that is impure." "He who comes into equity must do so with clean hands," or as otherwise expressed, "He that hath committed iniquity shall not have equity." American and Encyclopedia of Law, vol. 6, p. 708, note 2; *Creath v. Sims*, 5 How. (U. S.), 192; Daniels J.

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Francis, Maxims [1 Am. Ed.], 7. To mix up the language of the doctor's letter with that of a great jurist we would have something like the following: "The condign and appropriate answer to such a prayer from such a tribunal, is this, that you have speculated 'quite enough' upon your cosureties, 'already,'" Supreme court of the United States; 1 Pomeroy, Equity Jurisprudence, 435–443, and notes; Bispham's Equity [4 Ed.], 60–62, and notes. (3) The civilians had another maxim which our English "Shylocks" have been meeting face to face for more than seven hundred years, which is this: "Equality is equity;" or, as otherwise expressed, "equity delighteth in equality." American and English Encyclopedia of Law, vol. 6, p. 707, note 1; *Lake v. Gibson*, 1 L. C. Eq. 177; Bispham's Equity [4 Ed.], 60; 1 White & Tudor's L. C. Eq., 105, note. See, also, 1 Story's Equity Jurisprudence, sec. 64*f*; *Rice v. Morton*, 19 Mo. 281, 282; *Lawrence v. Blow*, 2 Leigh. 30; *Holt's Adm'r v. Creswell*, 72 Gill & Johnson, 37, 52; *Furnold v. Bank*, 44 Mo. 338; *Hickman & Pearson v. McCurdy*, 7 J. J. Marshall, 560, 561, 562; "A surety stands in such a relation to his principal" said ROGERS, J., "that he cannot be permitted to speculate upon him." And the rule is the same in relation to contribution between cosureties." *Wynne Adm'rs v. Brooke*, 5 Rawle, 106, 110; *Hickman v. McCurdy*, 7 J. J. Marshall, 555–560; 1 Hare & Wallace's L. C. Eq., 154, note; *McCormick's Adm'rs v. Abarmon's Ex. Devisees*, 3 Munford, 484, 487; *Daniel v. Ballard*, 2 Dana, 296, 297; *Morrison v. Poyntz*, 7 Dana, 307; *Rainy v. Yarborough*, 2 Ired. on Eq. 249–251; *Allen v. Wood*, 3 *Id.* 386–388; *Farr v. Ravenscraft*, 12 Gratt. 642; *Edgerly v. Emerson*, 3 Foster, 355; *Bank v. Robertson*, 19 Ala. 98; 1 Hare & Wallace's L. C. Eq., 156; *Mason v. Lord*, 20 Pick. 447, 449; *Fletcher v. Grover*, 11 N. H. 369; 1 Hare & Wallace's, L. C.

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Eq., 168; American and English Encyclopedia of Law, vol. 6, p. 712, division 11; Bispham's Eq., sec. 37; Bispham's Eq., sec. 47; *Mfg. Co. v. Worster*, 23 N. H. 462; *Penn v. Lord Baltimore*, 1 Ves. 444; 2 L. C. Eq., 767; *Muller v. Dows*, 4 Otto. 444; *McGregor v. McGregor*, 9 Iowa, 65; American and English Encyclopedia of Law, vol. 6. pp. 712, 713; 1 Pomeroy on Equity Jurisprudence, 468; *Roper v. Roper*, 3 Tenn. Ch. 53; *Parkes v. Parkes*, 3 Tenn. Ch. 687; *Vaughan v. Barclay*, 6 Whart. (Pa.), 392; *DeKlyn v. Watkins*, 3 Sandf. Ch. (N. Y.), 185. (4) "A purchaser, either at a judicial sale or under a deed of trust, who is guilty of any fraud, trick, or device, the object of which is to obtain the property at less than its value, and succeeds in doing so, will not be permitted to enjoy the fruits of his purchase." *Keiser v. Gammon*, 95 Mo. 217. "And the person who has gained an advantage by means of such fraudulent act, will be converted into a trustee for those who have been injured thereby." *McNew v. Booth*, 42 Mo. 189. "Such cases go upon the ground of fraud, and courts will give relief without regard to the circumstances, whether the agreement was a written or a verbal one; or whether it was supported by a consideration or not." *Slowry v. McMurry*, 27 Mo. 119; *Rose v. Bates*, 12 Mo. 30; *Dramschroeder v. Thias*, 51 Mo. 100; *Baier v. Berberich*, 6 Mo. App. 537, 540; *Grumley v. Webb*, 44 Mo. 444; *Peacock's Adm'r v. Nelson*, 50 Mo. 261; *Turner v. Johnson*, 95 Mo. 431; *O'Fallon v. Clopton*, 89 Mo. 284, 290; *Rogers v. Rogers*, 87 Mo. 257, 260; *Digby v. Jones*, 67 Mo. 104, 109; *McNees v. Swansy*, 50 Mo. 588; 37 Cent. L. J. 755.

Ellison, J.—This action was originally instituted as an action at law against the defendants on which judgment was asked against them on two promissory notes executed to them by one Grantham, and by them

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indorsed (and payment guaranteed) to O. H. Lewis. Lewis transferred the notes to plaintiff and Howsman, and Howsman thereafter sold his interest in the notes to plaintiff. The defendant Carnes had purchased a tractof land subject to the incumbrance of two deeds of trust, the payment of which he assumed. Carnes retained one-fifth interest in the land for himself, and sold to defendant Harber one-fifth, to plaintiff one-fifth, and to Howsman two-fifths; each of these parties assuming the proportion of the incumbrances that their portion of the land bore to the whole amount.

Defendant's answer and plaintiff's reply disclosed the following state of facts as stated by one of the plaintiff's declarations given by the trial court: "It is further admitted by the pleadings that the defendant, Carnes, became the purchaser of the land described in defendant's answer, May 7, 1887, at which time it was incumbered by two deeds of trust given to secure two notes, one for $2,250 and interest, the other for $1,200 and interest, both held by O. H. Lewis, which said defendant, Carnes, assumed and agreed to pay as part of the purchase money. That said defendant afterwards sold defendant Harber one undivided fifth of said land, plaintiff one undivided fifth of said land, and Wm. Howsman the undivided two-fifths of said land, all subject to said indebtedness, plaintiff and defendant Harber each assuming and agreeing to pay the undivided one-fifth, and said Howsman the undivided two-fifths of said indebtedness as part of their respective purchase prices for their parts of said lands. That said parties afterwards divided said land, one-fifth of which was set off and deeded to plaintiff subject to said incumbrance, one-fifth of which plaintiff assumed and agreed to pay. Two-fifths of said land was set off and deeded to said Howsman subject to said incumbrance, two-fifths of which he assumed and agreed to

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pay, and two-fifths of said land was set off to defendants, subject to said incumbrance, two-fifths of which (or one-fifth each) defendants assumed and agreed to pay. That defendants afterwards sold their part of said land to Fred. G. Grantham, and by agreement of all of said parties and said Lewis, said Lewis released said defendant's portion of said land from said two deeds of trust and in consideration of which said Grantham executed to defendants the two notes sued on secured by deed of trust on said part of said land purchased of defendants, which notes defendants assigned as collateral security to said Lewis to be collected and applied on defendant's portions of said $2,250 note and $1,200 note when they become due, which defendants had assumed and agreed to pay." It further appears that plaintiff paid to Lewis the two original notes, and thereby had assigned to him the two notes in suit which were held as collateral.

Plaintiff, by his reply, seeks to be subrogated to the rights of Lewis in the notes in suit, and the question is, has he shown himself entitled to the aid of a court of equity in this respect, under the facts as developed at the trial. The notes in suit were, as shown, secured by a deed of trust on the two-fifths interest in the land set apart to the defendants. E. P. Gates, Esq., an attorney, practicing law at Kansas City, Jackson county, Missouri, who had charge of Lewis' legal business, was trustee in this deed of trust. The trust deed provided that in case of sale thereunder the notice should be published in Jackson county, and the sale should take place at Independence, the county seat. Plaintiff and defendants reside at Trenton, Missouri, a distance of, perhaps, one hundred miles from Kansas City or Independence. They were at this time friends, and saw each other almost daily. The great preponderance of the evidence shows that Lewis held

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the notes as an investment for the interest thereon; and that it was agreed between Lewis and all the parties to this transaction including plaintiff, that he, Lewis, would not proceed to collect the money when it became due without first giving them notice. (I do not refer to this understanding as a binding agreement at law, but rather as it may affect plaintiff's *status* in seeking relief at the hands of a court of equity.) Plaintiff directed Mr. Gates, the trustee, to advertise and sell the land; which he did, plaintiff becoming the purchaser. Defendants knew nothing of the sale, or that one had been ordered, and were thereby deprived of the opportunity of protecting themselves. Plaintiff knew that defendants were solvent, and that the money could have been made off of them without resorting to the land, yet he did not demand payment of them or notify them of the intended sale, notwithstanding he was meeting them in Trenton almost daily. He concedes in his testimony that it was his desire to get the land. Plaintiff impressed Mr. Gates, so that gentleman testified, that in directing a sale he was acting for all the parties in interest, including these defendants, and, by reason of such impression, Mr. Gates did not notify defendants of the sale by sending them a copy of the advertisement, as he would otherwise have done. It does not appear that defendants knew that plaintiff had paid off the original incumbrance to Lewis and received from him an assignment of the notes in suit. On the contrary, it was shown that they would have paid the amount represented by these notes (being their portion on the original incumbrance) on demand, and that immediately upon learning of the sale they tendered to plaintiff their portion of the $2,250, for which the note for $900 was collateral, together with all his expenses. Defendants also, when plaintiff had gotten from Lewis the note of $600, which was col-

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lateral for their share of the $1,200 note, offered to pay it and the amount due from them on the $900, and all his expenses. These offers were refused.

The trial court entered a decree in substance that if plaintiff would make a deed to defendants of the lands purchased by him at the sale under the deed of trust, within thirty days, that judgment should be entered for him, plaintiff, for $1,540.73, being the amount due him on the notes including interest, taxes and costs of sale. This we consider an equitable adjustment of the entire transaction as it appears in the record, and we shall order its affirmance.

By reference to authorities cited by counsel those principles of equity, which have found expression in a variety of maxims, will be found: "He who seeks equity, must do equity," that is, he will only be allowed to obtain equity upon equitable terms or conditions which will be imposed by the chancellor. Now, in this case the evidence preponderates in favor of the contention that it was understood and agreed, between all the parties to the land purchase, that Lewis preferred that the notes continue at interest after maturity, and when he wanted the money on them he would notify the parties. Plaintiff, being a party to this understanding, of course knew of it when he obtained the notes from Lewis. He knew that the parties lived a long distance from the place of sale and were not likely to see an advertisement of sale in the papers. Notwithstanding this, and the fact that he was on friendly terms and in daily contact with defendants, boarding at the same hotel with one of them, and knew that they were pecuniarily responsible for the amount represented by the notes, he never mentioned the matter to them. We must conclude that his keeping his actions and intentions secret from defendants was for a purpose not equitable or just to them, and such

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was the result. Indeed plaintiff does not deny but that his object was "to get even" with defendant Carnes on account of "another trade," with which, of course, we have nothing to do.

2. Objection is made to a deposition taken by plaintiff, but used and admitted for defendants for the reason that it was not signed by the deponent. Signing was waived by the parties at the close of the taking, and this we regard as sufficient to authorize the use of the deposition. It has now become a practice in many places to take depositions with the aid of a stenographer; it sometimes being inconvenient for the witness to wait until the stenographic notes are transcribed, his signature is waived by the parties and so certified by the notary.

We have given attention to the line of argument offered in plaintiff's behalf, and do not take issue with many of the legal propositions asserted, though we think them not applicable in behalf of a party himself seeking equitable relief under the circumstances surrounding these parties as shown by the record. The formal objections taken to the decree in the cause are not deemed sufficient to justify a reversal.

The judgment will be affirmed. All concur.

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ALBERT C. NICHOLS, Respondent, v. COMMERCIAL BANK OF BURLINGTON JUNCTION, Appellant. 55 81 / 62 602 / 55 81 / 162a 311

**Kansas City Court of Appeals, November 20, 1893.**

1. **Action:** PETITION: EX CONTRACTU. The petition charged the breach of a parol promise to pay a check and that plaintiff was induced thereby to sell certain cattle to L. and receive in payment said check, which defendant refused to pay to plaintiff's damage, etc. *Held,* the action was *ex contractu,* since there is no allegation of fraud or deceit.



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2. **Frauds and Perjuries:** ORIGINAL PROMISE: COLLATERAL PROMISE: ESTOPPEL. The evidence in this case is reviewed and it is *held:*

(1) That the representations of defendant's cashier did not constitute an unconditional promise, but a mere expression of opinion.

(2) Nor were they an original promise that would bind the defendant.

(3) But if such representation amounted to a promise at all, it was in its nature collateral and within the statute of frauds.

(4) That the check in question was an inland bill of exchange and a promise to accept it must be in writing.

(5) That plaintiff's case did not come within the provisions of section 723, Revised Statutes, 1889.

(6) That the words and conduct of defendant's cashier could not operate as an estoppel *in pais,* as one cannot invoke the doctrine of estoppel to validate a promise which the statute declares absolutely void.

*Appeal from the Nodaway Circuit Court.*—HON. CYRUS A. ANTHONY, Judge.

REVERSED.

*William C. Ellison* for appelant.

(1) All of the statements of the assistant cashier were verbal, and, therefore, created no binding obligation on the bank to pay the check. A promise to accept or pay a check, as in the case of bills of exchange, must be in writing. *Bank v. Bank,* 30 Mo. App. 271; *Risley v. Bank,* 83 N. Y. 318; *Walton v. Mandeville,* 56 Iowa, 597; Randolph on Commercial Paper, vol. 1, sec. 80, says a postdated check is, to all intents and purposes, a bill of exchange. To the same effect see *Id.* vol. 2, sec. 568, 648; Daniel on Negotiable Instruments, vol. 2, sec. 1607; Tiedeman on Commercial Paper, sec. 437; *Bank v. Carter,* 88 Tenn. 279, Revised Statutes of 1889, vol. 1, secs. 719, 720; *Flato*

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*v. Mulhall*, 72 Mo. 522; s. c., 41 Mo. App. 476; *Lee v. Porter*, 18 Mo. App. 377; *Walton v. Mandeville et al.* (9 N. W. 913), 56 Iowa, 597. (2) Assuming that the assistant cashier's agreement in relation to the check, created no obligation which could be enforced against the bank, because void under the statute of frauds, I think it clearly follows that no action in tort, founded on a breach of the agreement, can be sustained. To do so, would be a greater fraud upon the law than is complained of in this case as having been practiced upon the plaintiff. It cannot be said to be fraudulent to refuse to perform an agreement which one is under no legal obligation to perform. *Dang v. Parker*, 52 N. Y. 494; *Winston v. Young*, 53 N. W. Rep. (Minn.) 1015; *Lydick v. Holland*, 83 Mo. 703; *Bernhart v. Walls*, 29 Mo. App. 206.

*W. W. Ramsay* and *T. J. Johnston* for respondent.

(1) The cashier of a bank is the agent of the bank and the chief manager of its banking business; in short, he is its executive in performing all the offices or functions of its organization and committed by its charter to the directory. *Bissel v. Bank*, 69 Pa. St. 415; *Bank v. Bank*, 1 Parson's Select Cases, 180; *Everett v. United States*, 6 Porter (Ala.) 166; s. c., 30 Am. Dec. 584; *Corser v. Paul*, 41 N. H. 24; s. c. 77 Am. Dec. 753, and note, 759 *et seq.; Ex parte Winson*, 3 Stony, 411. And a bank is bound by the declarations of its cashier made within the scope of his authority; *Bank v. Haskell*, 51 N.H. 116; s. c., 12 Am. Rep. 67. It is not essential to the validity of the act of the cashier that it should be done at the bank or within banking hours. *Bissell v. Bank, supra; Bank v. Bank*, 10 Wall. U. S. 604; *Houghton v. Bank*, 26 Wis. 663; s. c., 7 Am. Rep.

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at pp. 110, 111. (2) The defendant is estopped to deny its liability to the plaintiff for the damages resulting to him, by its conduct in inducing him to part with his cattle to one whom it knew to be insolvent at the time, by promising payment for his cattle if he would present Logan's check for them. This is not a case where defendant, through its agent, promised to honor or pay Logan's check already drawn, or to be drawn, for a past consideration, as for cattle already sold—not that; but a promise and statement that induced the plaintiff to deliver his cattle, and who made the inquiry for the purpose of determining whether he should deliver them, and of which purpose defendant was aware, and upon the strength of which, alone, he did deliver them and permit them to be shipped out of the state. *Freeman v. Cook*, 2 Exchq. 654; 2 Herman on Estoppel and Res Jud. 880, 884, sec. 953; *Pickard v. Sears*, 6 Ad. and Ellis 469. (3) Where one, by either acts or words, influences another to act in a particular manner so as to change his previous condition, such an one will not be permitted to deny the truth of such acts or statements to the injury of the other; nor need it be his intention specifically to induce the other to so act; provided his statements or conduct be of such a character as would naturally induce the other to act as he did in relation to the matter. And this applies in all cases where it would be inequitable and against conscience to permit him to deny the truth of his acts or representations. *Horn v. Cole*, 51 N. H. 287; s. c., 12 Am. Rep. 111; *Mitchell v. Reed*, 9 Cal. 205; *Dezell v. O'Dell*, 3 Hill, N. Y. 220; *Buchanan v. Moore*, 13 Serg. & R. 304; s. c., 15 Am. Dec. 601; *Welland Canal Co. v. Hathway*, 8 Wend. 480; *Justices v. Town of Lancaster*, 20 Mo. App. 559, *loc. cit.* 562; *Choteau v. Goddin*, 39 Mo. 229; *Zepp v. Taylor*, 14 Mo. 482; *Guffey v. O'Reiley*, 88 Mo. 418 *loc. cit.* 424; *Espey*

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*v. Bank*, 18 Wall. U. S. 604, *loc. cit.* 617, 618, 621; *Nelson v. Bank*, 48 Ill. 36; *Light v. Powers*, 13 Kan. 96; *Bank v. Bank*, 30 Mo. App. 278, 279; *Pope v. Bank*, 59 Barb. N. Y. 226; *Weinstein v. Bank*, 69 Tex. 38; s. c., 5 Am. S. R. 23; *Bank v. Bank*, 50 N. Y. 575; *Bank v. Haskell*, 51 N. H. 116; s. c., 12 Am. Rep. 67 and note 75. (4) Corporations are liable for the acts of their agents within the scope of their powers, and are estopped by the same state of facts as natural persons, as they can only act by agents. *Railroad v. Schuyler et al.*, 34 N. Y. 50, 51; Herman on Estoppel and Res Judicata, secs. 1165, 1369, 1170. The statute of frauds and other statutes require certain contracts to be evidenced by writing; yet a party may so conduct himself, by acts or words, in regard to some matter in which he has an interest, as to estop himself from asserting such right in such matter or thing to the injury of another, who was induced by such acts or words to change his condition; Herman on Estoppel and Res Judicata, secs. 932, 933, 934, 935, *et seq.* *Wendell v. Rensselaer*, 1 Johns. Ch. 334, *loc. cit.* 335. (5) Where one, assuming to act as agent of and in behalf of a principal, whether so authorized or not, or whether really an agent in fact, if the one in whose behalf he acts, and whom he pretends to represent, afterwards recognizes his acts by appropriating the benefits, or by taking steps to carry out the arrangements of the transactions set on foot by such agent, or assumed agent, if he do so with knowledge of what the transaction is, and its import, he will be bound as though such had been done by his previous authorization; and *a fortiori*, where it would be to the injury of the one with whom such agent or assumed agent had such transaction, for such principal to refuse to carry out the agreement after having so recognized it and taking steps to carry it out. A principal cannot

ratify a transaction in part done by an agent, or assumed agent, acting in his behalf, and repudiate the balance of it. Story on Agency [Bennett's Ed.], sec. 250; Herman on Estoppel and Res Judicata, sec. 1065; 1 Field's Lawyers' Briefs, p. 135, sec. 149; *Busch v. Wilcox*, 82 Mich. 336; s. c., 21 Am S. Rep. 656, 657. *Mundorff v. Wickersham*, 63 Penn. St. 87; s. c., 3 Am. Rep. 531. Story on Agency [Bennett Ed.], secs. 242, 252, 253; *Bank v. Frick*, 75 Mo. 178, *loc. cit.* 183. (6) The undertaking of the defendant was an original and not a collateral one, and therefore did not require to be reduced to or evidenced by writing. The consideration for the promise was the cattle delivered by plaintiff to Logan, and the drawing of the draft by him on Perry Bros.; the defendant, through its agent, promised to pay that consideration if plaintiff would make the delivery and Logan make the draft. And did the defendant bank, the next day after the delivery of the plaintiff's cattle, receive Logan's draft on Perry Bros. for the amount of the purchase price of said cattle and forward it to them at Omaha for payment, just to blind the plaintiff by making him believe it was but the carrying out of the prior arrangement and promise, while in fact it was but the part the bank was to play in the scheme to beat the plaintiff; or was it not rather an act of good faith on the part of the bank to honestly keep and perform its part of the agreement made between its agent, the assistant cashier, and the plaintiff? The law will not tolerate the first supposition—not permit the defendant to thus stultify itself, or take advantage of its own wrong. *Glenn v. Lehnen*, 54 Mo. 45; Brown on Frauds, sec. 197; Wood on Stat. Frauds, secs. 94, 143; *Kansas City S. P. Co. v. Smith*, 36 Mo. App. 608, and citations.

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SMITH, P. J.—This is an action brought by plaintiff against the defendant, a corporate bank, to recover damages.

The cause was submitted to the court upon an agreed statement of facts, the substance of which was: *First.* That the plaintiff, a farmer residing near Burlington Junction, entered into a parol contract with one, Logan, whereby the plaintiff was to sell and deliver to the latter at the farm of the former certain cattle at a price to be agreed upon, the cattle to be delivered and the purchase money paid by a check on defendant bank. The cattle were to be shipped to Perry Bros., at Omaha. *Second.* Logan was known to both plaintiff and defendant to be insolvent. *Third.* On the day before the cattle were to be delivered, the plaintiff desiring to know whether the check of Logan for the value of the cattle would be paid by the defendant bank, went to the town of Burlington Junction, and there met the assistant cashier of defendant bank on the street before banking hours, and there stated to him the contract which he had entered into with Logan, and there inquired of said assistant cashier if said Logan's check on his bank for an amount that would cover the value (then not known) of two car loads of cattle, would be good and accepted by his bank; and said assistant cashier answered that Logan had been drawing drafts on Perry Bros., payable to his bank, and Perry Bros. had always promptly honored said drafts, and his bank had been paying Logan's checks on it drawn against said drafts, and that in this instance he had no doubt but that Logan's check on his bank for the cattle *would be good* and *that his bank would pay it;* that Logan had no funds himself, but that if he would make a draft in favor of his bank on Perry Bros. for the amount the cattle would bring, there was no doubt that Perry Bros.

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would pay the same, and that he thought there was no risk in the plaintiff's accepting Logan's check for the cattle;—in fact his bank would have paid the check without waiting to hear from the draft. *Fourth.* That relying on the statement of defendant bank's assistant cashier, and believing the same to be true that Logan's check on the defendant bank would be paid by it, the plaintiff was thereby induced to deliver his cattle to Logan, and to accept in payment thereof his check on the defendant bank for the sum of $2,129.65, and the said Logan thereupon received the cattle and shipped them to Perry Bros. at Omaha. *Fifth.* That on the day following the delivery of the cattle and the acceptance of the check by plaintiff, Logan drew a draft in favor of defendant bank on Perry Bros. for an amount covering the purchase price of the plaintiff's cattle, and delivered said draft to the defendant bank; that shortly thereafter, on the same day, the plaintiff indorsed and mailed Logan's check to a bank in a neighboring town where plaintiff owed money, and directed that bank to collect the check in the usual course of business and place the amount thereof to his credit; but fearing this course might not be without risk, and within time to have withdrawn his letter from the mail, he went to the defendant bank and told the assistant cashier what he had done, and asked him if that course would be safe and all right. He answered that *it was all right and the check would be paid.* Neither the draft or check was ever paid, nor has the purchase money for the cattle been received by plaintiff.

The court rendered judgment for plaintiff for $2,207.71, and the question which we are required by by the defendant's appeal to determine is, whether the court applied the law arising on the undisputed facts and rendered thereon the judgment of the law.

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Turning to the plaintiff's petition we find it charges the breach of a parol promise of the defendant bank, made through its assistant cashier, to pay a certain check thereafter to be drawn on it. It further charges that by reason of such promise of defendant's cashier, the plaintiff was induced to sell certain cattle to one Logan and receive in payment thereof said check which the defendant had refused to pay, whereby plaintiff is damaged by the loss of said cattle in the sum of $2,129.65. It is seen that, according to this exposition of the petition, the action is *ex contractu*. There is no allegation of fraud or deceit. *Peers v. Davis*, 29 Mo. 184; *Walker v. Martin*, 8 Mo. App. 560.

Recurring to the agreed statement of facts it will be found that the defendant's cashier did not make an explicit, unconditional promise to pay Logan's check. In the language used by defendant's cashier, there is nothing expressed beyond his opinion or conviction. He stated to plaintiff that Logan had no funds himself, but that if he would make a draft in favor of the bank on Perry Bros. for the amount the cattle would bring, there was *no doubt* but that Perry Bros. would honor the same, and that *he thought* there was no risk in the plaintiff accepting Logan's check for the cattle. In fact the bank would have paid the check without waiting to hear from the draft. In the last sentence of the foregoing quotation, the words "*he thought*" are implied after the words "in fact," so that the sentence thus construed would read: "In fact 'he thought' the bank would have paid the check without waiting to hear from the draft." It will be seen that this interpellation is not only authorized by the words of the quotation which precede it, but that they are necessary to convey the full meaning intended to be expressed by the person who spoke them. Nor does the language used by the defendant's assistant

cashier during his conversation with plaintiff on the day after the check had been received by plaintiff express more than an *opinion that plaintiff's course would be safe and all right, and that the check would be paid.* There is nothing from the beginning to the end in any representation or assurance of defendant's assistant cashier that goes further than the mere expression of an opinion that, in the event that certain transactions were had, that the bank would pay the check. This we think to be the full import and meaning of the language employed by defendant's assistant cashier.

It nowhere is made to appear that the plaintiff was induced to receive of Logan his check in payment for the cattle upon the faith of an unconditional promise of defendant's assistant cashier that it would pay such check. The cattle were not sold and delivered to Logan in pursuance of any request or direction of defendant's assistant cashier, or under any promise, if plaintiff would or should do so, that the defendant would pay him the purchase price thereof, so that there is no original promise that would bind the defendant. And since the bank had no funds of Logan, to certify his check would have been but a promise to pay the debt of another, and void under the statute if not made in writing. If the defendant's assistant cashier made any unconditional promise at all to pay Logan's check for plaintiff's cattle, it was, in its very nature, collateral, and, not being in writing, was within the statute of frauds.

But, assuming that the defendant's assistant cashier before or after the sale and delivery of the cattle made a parol promise to pay or accept an existing or nonexisting check of Logan's, still no action can be maintained for a breach of such promise, because not permitted by the statute. Revised Statutes, secs. 719, 720.

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We omitted to state at the proper place that the check in question was postdated, and such being the case, it was to all intents and purposes an inland bill of exchange (Randolph on Commercial Paper, secs. 80, 568; *Bank v. Carter*, 88 Tenn. 279), and no action could be maintained on a promise to accept the same, unless it was in writing. *Lee v. Porter*, 18 Mo. App. 377; *Flato v. Mulhall*, 72 Mo. 522.

Nor does section 723, Revised Statutes, help the plaintiff, because he was not the drawer of the check, nor was he otherwise within its provisions. *Brinkman v. Hunter*, 73 Mo. 172; *Flato v. Mulhall, supra; Blackiston v. Dudley*, 5 Duer. 373; *Bank v. Bank*, 30 Mo. App. 271.

But it is insisted that the action can be maintained upon the theory of an *estoppel in pais*. It is quite difficult to understand how this can be so, as it is not perceived that there exists in the case the groundwork of an estoppel. If the parol promise of the defendant's assistant cashier was void in law, this the plaintiff must be presumed to have known, and therefore he had no right to rely upon the same. If he did, he must accept the consequences of his own imprudence. He cannot invoke the doctrine of an estoppel to validate a promise which the statute declares absolutely void. The rule is, that no one can be estopped by an act that is illegal and void, and an estoppel can only operate in favor of a party injured in a case where there is no provision of law forbidding the party against whom the estoppel is to operate from doing the act which is sought to be carried out through its operation. 2 Herman on Estoppel, 922.

This seems to be a case of great hardship on the plaintiff, and we regret that we are unable to find any principle of law applicable to the facts which justifies us in upholding the judgment. It follows that the judgment must be reversed. All concur.

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JAMES J. McMANUS, Appellant, v. HIRAM WATKINS *et al.*, Respondents.

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**Kansas City Court of Appeals, November 20, 1893.**

1. **Appellate Practice:** MATTERS NOT IN MOTION FOR NEW TRIAL. Errors not referred to in the motion for a new trial will not be considered on appeal.

2. **Warranty:** WORKING SATISFACTORILY: EVIDENCE. An action on the warranty of a machine will not be defeated by a paper signed after the sale, stating that the machine was working satisfactorily, and such paper does not estop the warrantee from the setting up of a breach of warranty, and testifying to matters inconsistent with such paper; nor will such paper be excluded in this case, because it prevented plaintiff from claiming back from the machine company, nor because it was an injury to plaintiff to have the admission in the report disproved.

*Appeal from the Gentry Circuit Court.*—HON. A. M. WOODSON, Judge.

AFFIRMED.

*Ed. E. Aleshire* for appellant.

(1) "The mere failure of a party to a contract, who labors under no disability or infirmity, through his own fault and neglect, to read it or inform himself as to its contents, is not sufficient to annul or overcome its legal effect as to him." *Gwin v. Waggoner*, 98 Mo. 315; *Black River Lumber Co. v. Warner*, 93 Mo. 374; *Huse v. McQuade*, 52 Mo. 388; *Johnson County v. Wood*, 84 Mo. 489; *Clark v. Diffenderfer*, 31 Mo. App. 232; *John T. Hair & Co. v. Walmsley*, 32 Mo. App. 115; *Reed v. Nicholson*, 37 Mo. App. 646. (2) Plaintiff's instruction number 4, found at bottom of page

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19, should have been given. If it was not error to refuse this instruction, then it was error to admit the report in evidence. It was the duty of the court in some manner to instruct the jury what weight should be given to the report. I contend that this report, made by an intelligent man who could read and write, was sufficient to estop the defendants from claiming a breach of the warranty. It embraces all of the evidence of estoppel, in this: *First.* It was an admission inconsistent with the evidence of Watkins that the machine did not do good work. *Second.* It prevented McManus from reclaiming back from the Whitely Machine Company because his customer had accepted the machine. *Third.* It was an injury to plaintiff to have the admission in the report disproved, and resulted in a judgment against him. *Taylor & Mason v. John and Jacob Zepp*, 14 Mo. 482; *Newman v. Hook*, 37 Mo. 207; *Hundley v. Filbert*, 73 Mo. 34; *Mateer v. Railroad*, 105 Mo. 320.

*McCullough & Peery* for respondents.

Upon the merits of the case there is no merit in this appeal. The evidence was ample to support the verdict. The issues were fairly presented by the instructions. The only question that could arise is upon the paper or report offered by plaintiff and claimed to constitute an estoppel on the part of the defendant. As to this point appellant is concluded by a decision of this court in a case in all respects like this one. It would, in fact, be difficult to find two cases more nearly alike. *Fairbanks v. DeLissa*, 36 Mo. App. 711. That case also disposes of any question arising on the evidence in the case at bar. And we submit this case so far as the merits are concerned, by simply calling attention to the former opinion.

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Ellison, J.—Plaintiff seeks to recover the amount of a note given by defendant to plaintiff as a part of the purchase price of a twine binder. Defendant defends on the ground that the binder was warranted to do good work and that it failed to do so and that defendant returned it to plaintiff. There was a judgment for defendant and plaintiff comes here.

We are precluded from giving attention to much of the brief and argument of plaintiff aimed at alleged errors in the trial below, for the reason that plaintiff failed to refer to such errors in his motion for a new trial. The motion for new trial complains only of the giving of defendant's instructions 1 and 2 and the refusal of plaintiff's instruction number 4; and of permitting two witnesses to testify to the statements made by one McGuff, as to what was to be contained in a written report which was signed by defendant. The exception to the two instructions given for defendant is not pressed on this appeal and we will, therefore, consider the two remaining objections.

The instruction refused for plaintiff was, in effect, a direction to the jury to find for plaintiff. Defendant had signed a written paper on the twenty-fifth of June, 1890, stating that the machine was "working satisfactorily." The instruction declared that if the jury believed such was the case, that then defendant was estopped from setting up a breach of warranty and the finding should be for plaintiff. Plaintiff for his reasons in support of this says: *First*. That the admission was inconsistent with the evidence of the defendant. This may be readily granted, and yet it is no reason why the jury should not be left at liberty to consider the whole evidence in connection with this admission. *Second*. That this acknowledgment that the machine was working satisfactorily prevented plaintiff "from

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reclaiming back from the Whitely Machine Company." There is nothing in the case to show what contracts or rights existed on plaintiff's part against the Whitely Machine Company, or, indeed of any relation whatever existing between them. *Third.* That "it was an injury to plaintiff to have the admission in the report disproved." Conceding this, it was only such an injury as results to any party from the consideration of competent testimony.

We have found no objection to the trial which would justify our interference and we affirm the judgment. All concur.

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## Springfield Engine and Thresher Company, Respondents, v. Henry E. Glazier, Appellant.

**Kansas City Court of Appeals, November 20, 1893.**

1. **Justices' Courts:** JURISDICTION: ATTACHMENT: INTERPLEA. Where a justice acquires jurisdiction of an attachment proceeding, he also has jurisdiction to hear and determine an interplea for the attached property, although such property exceeds in value the amount fixed by statute as the limit of justices' jurisdiction, such interplea being an incident growing out of the principal action.

2. **Chattel Mortgage:** DESCRIPTION: DELIVERY. Though the description in a chattel mortgage be insufficient, yet if possession is delivered to the mortgagee before the rights of third parties attach, they can take no advantage of the faulty description, as delivery cures such defects.

3. ———: DELIVERY TO AGENT. A delivery to a third person for the mortgagee's use is a good delivery, if accepted by the mortgagee; and delivery to an agent is as effective as delivery to the mortgagee.

4. **Instruction:** ATTACHMENT: INTERPLEA. An instruction directing the jury to find for the interpleader for such of the property, sold under attachment, as they believe to be included in his mortgage is affirmed.

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5. ——— : ——— : ———: VALUE OF PROPERTY. On an interplea for property seized in attachment, the only issue to try is whether the attached property is the interpleader's or not, and an instruction as to the value of such property is error; and on a finding for the interpleader the court should adjudge the fund in its custody, arising from the sale of the property, to the interpleader.

*Appeal from the DeKalb Circuit Court.*—HON. CHAS. H. S. GOODMAN, Judge.

REVERSED AND REMANDED.

*Samuel G. Loring* for appellant.

(1) The court erred in refusing the fourth instruction prayed for by the defendant, Glazier. Revised Statutes, sec. 572, p. 229. There are no statutes for the filing of interpleas in attachment cases before justices, other than section 604, page 234. *Spooner v. Ross*, 24 Mo. App. 603; *Bergart v. Borchert*, 59 Mo. 85; *Scott v. Russell*, 39 Mo. 410. (2) The court erred in admitting in evidence the chattel mortgage from John and Robert Head to this plaintiff, and in refusing the sixth instruction prayed for by defendant. If the plaintiff was unable to determine what property was attempted to be conveyed by said mortgage, how was it possible for the defendant to ascertain that fact? As to him the mortgage was void for uncertainty. *Chandler v. West*, 37 App. 634; *Stambaker v. Ford*, 81 Mo. 539; *Hughes v. Manifee*, 29 Mo. App. 204; *Bank v. Metcalf*, 29 Mo. App. 384; *Montgomery v. Wright*, 8 Mich. 143; *Nicholson v. Koape*, 58 Mass. 34; *Kelley v. Reed*, 57 Miss. 89; *Cord v. Cooper*, 30 Ind. 9. It should not have been admitted in evidence, and defendant's sixth instruction should have been given. (3) The court erred in giving the first and second instructions upon the part of the plaintiff, for the reason there was no evidence upon which to base said instructions; and

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further, the court erred in giving the four instructions prayed for by plaintiff, for the reason that they were not responsive to the issues in the case. *Hewson v. Toalle*, 72 Mo. 637; *Miles v. Thompson*, 61 Mo. 407; *Rendskoff v. Rodgers*, 34 Mo. App. 126.

*Harwood & Miller* for respondent.

(1) There is no law, justice or merit in the position that the justice had no jurisdiction to entertain the interplea, on account of the property attached selling for more than $150, after the justice had decided against the interpleader. An interplea, although it may be in the nature of a replevin suit grafted onto an attachment suit, must be tried in the forum where the property is *custodia legis*—and, if the property is sold before the interplea is finally determined, the interpleader can elect to take the money in place of the property—if he recovers. *White v. Graves*, 68 Mo. 221; *Wooldridh v. Quinn*, 70 Mo. 370. The statute gives the right to interplead in attachment suits. 1 Revised Statutes, 1889, sec. 572, p. 229. There is no limit as to value in the statute. (2) The appellant's counsel lays much stress, in his brief, upon the proposition that the verdict of the jury in this case is not responsive to the issues, and cites *Hewson v. Tootle*, 72 Mo. 635. He evidently forgot that the verdict in this case is, "We, the jury, find for the interpleader to the amount of $116.45." Not a judgment for the plaintiff, as was the judgment in *Hewson v. Tootle*, but for the interpleader. Just such a judgment as Judge HENRY says would have been good in that case. (3) The right to recover is not defeated by a sale after the interplea is filed. *Mansur v. Hill*, 22 Mo. App. 372. (4) The right to interplead in attachment proceedings being a right given by statute, and no limit as to value being imposed



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by the statute, no such limit can be engrafted on the statute by construction. And again, the limit as to the value over which justices of the peace have jurisdiction applies to the suit, and not to third parties and strangers who are compelled to intervene to protect their own rights. "The interplea is in no sense part of the cause of action; it is the assertion of an independent right." *Wolf et al. v. Vette*, 17 Mo. App. 36. The instructions given on the part of the interpleader correctly stated the law applicable to the facts; and the verdict being for the right party the judgment should be affirmed. *Orth v. Dorschlein*, 32 Mo. 366; *Garesche v. Deane*, 40 Mo. 168.

SMITH, P. J.—It appears from the record in this case that Henry E. Glazier commenced a suit by attachment against John and Robert Head before a justice of the peace of DeKalb county. The writ of attachment was levied on certain personal property which was, on the application of the plaintiff therein, ordered by the justice to be sold under the provision of section 493, Revised Statutes. Afterwards the Springfield Engine and Thresher Company filed an interplea claiming the attached property.

Upon the issue so made between the plaintiff in the attachment and the interpleader the case was subsequently tried in the circuit court, where the judgment was for the interpleader, and from which the attachment plaintiff has appealed.

The first ground upon which the attachment plaintiff demands a reversal of the judgment is, that the trial court erred in refusing to declare the law as requested in his fourth instruction, to the effect that, under the pleadings and evidence it did not have jurisdiction of the action. Even if we concede the value of the property in controversy to be in excess of the sum

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of $150 as contended by the attachment plaintiff, yet this did not deprive the court of jurisdiction of the subject-matter of the interpleader's claim. This identical question was determined in *Mills v. Thompson*, 61 Mo. 415, where it was said "that, inasmuch as the value of the property claimed by interpleader exceeded the amount imposed by law, as the statutory limit to recoveries of personal property in actions before justices of the peace, it is insisted that the justice had no jurisdiction in regard to the interplea. This view is thought to be incorrect. That the justice had jurisdiction in the original suit, there can arise no doubt; and this interplea is but a collateral matter—an incident growing out of the principal action. Besides, the same statute which allows interpleas in the circuit court authorizes their filing before justices of the peace, and no limit is assigned in the section referred to as to the value of the property which is the subject of the interplea. And, were we to assign a limit in cases of this sort, we would do that which the law itself has not done."

A further contention of the attachment plaintiff is, that the court erred in admitting in evidence a mortgage deed made by the attachment defendants to the interpleader and in refusing to instruct the jury that such mortgage was void. The property described by the mortgage consisted, in part, of "one gray mare five years old; one bay mare four years old; three yearling heifers; two cows two years old; one cow four years old; one cow five years old, and two cows seven years old." The property was described in the constable's return on the writ of attachment and claimed by the interpleader to be "one spotted cow; one red cow with bob tail; one red cow with spots on forehead; one red and white cow; one red cow with white flanks; one

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gray mare of reddish cast about nine years old; one pony mare, bay color, about seven years old."

The property described, or intended to be described, in the mortgage was left in the possession of the defendant mortgagors. This was in August, 1888. It seems that the mortgage was given to secure the payment of three notes for $500 each. In December, 1889, the attachment defendants removed to Oklahoma after making default in the payment of two of said notes, the third not falling due until January, 1891. The defendants, before their departure to Oklahoma, turned over to the possession of their brother, Alfred Head, who remained on the place where one of the defendants resided at the time of his removal, the mares and cows, which is the subject of the interpleader's claim, with instructions to keep them until called for by interpleader, and then turn them over to it. That the cows were at another place where they were left and that they were there attached. The mares were turned over to the agent of the interpleader and were in his possession when attached. Now, it seems to us that, in the light of the authorities the description, in the mortgage, if there was nothing else, would be subject to the objection which the attachment plaintiff has urged against it.

It has been decided that, when a mortgage was fatally defective but possession was delivered to the mortgagee before the rights of third parties had attached, that such third party could take no advantage of the faulty description. *Bank v. Sargent*, 20 Kan. 576. Delivery cures defects in description. Cobby on Chattel Mortgages, sec. 187; *Morrow v. Reed*, 30 Wis. 81. So it has often been held in other jurisdictions that possession taken by the mortgagee with the mortgagor's assent before the rights of third parties intervene, cures defects in descriptions and is an identifica-

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tion of the property. *Frost v. Bank*, 68 Wis. 234; *Morrow v. Reed*, 30 Wis. 84; *Williamson v. Steel*, 3 Lea, 530; *Stephenson v. Tucker*, 14 N. J. 600; *Cameron v. Marvin*, 26 Kan. 624; *Frank v. Miner*, 50 Ill. 444. And a similar rule has been repeatedly recognized in this state. *Wood v. Hall*, 23 Mo. App. 110; *Moser v. Claes*, 23 Mo. App. 420; *Nash v. Norment*, 5 Mo. App. 545; *Greely v. Reading*, 74 Mo. 309; *Petring v. Chrisler*, 90 Mo. 649; *Dobyns v. Meyer*, 95 Mo. 132. And a delivery to a third person for the mortgagee's use is a good delivery if accepted by the mortgagee. Delivery to an agent is as effective as a delivery to the mortgagee. Cobby on Chattel Mortgage, sec. 508; *Jones v. Swayze*, 42 N. J. Law, 279; *McPartland v. Read*, 11 Allen, 231.

According to the principles of these authorities the court did not err in refusing to exclude the mortgage from the evidence, or to declare it void. The interpleader, on the evidence adduced by it, was entitled to a submission of the case to the jury under appropriate instructions.

No error is perceived in the action of the court in giving the interpleader's second instruction which told the jury that, if they believed from the evidence that the property sold by the constable under the attachment, or any part of it, was that included in the mortgage of the plaintiff, no doubt meaning interpleader, they would find for it as to such property.

But we think the court did err in the giving of the first, third and fourth instructions for the interpleader, in so far as they directed the jury that, if they found the issue for interpleader, they should find the amount of the money which said property sold for at the constable's sale, or the value of the property not less than it sold for at the constable's sale. The jury found "for the interpleader to the amount of $116.45."

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These instructions should not have been given. *Rindskoff v. Rogers*, 34 Mo. App. 126; *Nolan v. Deutch*, 23 Mo. App. 1. They led the jury into the error of finding a verdict that was not responsive to the issues in the case. The only issue which the jury was required to try was, whether the attached property was that of the interpleader or not. *Mills v. Thompson*, 61 Mo. 407; *Hewson v. Tootle*, 72 Mo. 637. It was the function of the court, if the property attached was found to be the property of the interpleader, to adjudge the fund in its custody, arising from the sale, to the interpleader. It was not a matter for the consideration of the jury.

It follows that the judgment of the circuit court must be reversed, and the cause remanded for further trial in conformity to the principles of law which have been declared in the foregoing opinion. All concur.

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CAHILL, COLLINS & COMPANY, Repondents, v. L. B. ELY *et al.*, Appellants.

**Kansas City Court of Appeals, November 20, 1893.**

**Mechanics' Liens:** LIEN PAPER: CONTRACTOR. It is not necessary that the lien paper would, in terms, allege that the person to whom the material was furnished was the original contractor; it is sufficient if it states the names of the contracting parties, with whom the plaintiffs agreed to do the work and furnish the material without stating the contractor made a contract with the owner; and the lien paper in this case is *held*, sufficient, since it gave the owner all the information necessary to protect himself.

*Appeal from the Carroll Circuit Court.*—HON. E. J. BROADUS, Judge.

AFFIRMED.

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*Pattison & Timmons* attorneys for Ely.

(1) While the later decisions of the courts of our state declare that the law in relation to mechanics' liens ought to be liberally construed, yet it shall be remembered that a mechanics' lien is purely of statutory creation, and that it can only be maintained by a substantial observance of, and compliance with, the provisions of the statute. *Malther v. Falcon Mining Co.*, 2 Pac. Rep. 50; Phillips on Mechanics' Liens, sec. 89. (2) This lien must contain, if known, the names of both the owner and contractor. Revised Statutes, 1889, sec. 6709; *Bertheolet v. Parker*, 43 Wis. 551; *Malther v. Falcon Mining Co.*, 18 Nev. 209; *Gordon v. Deal*, 31 Pac. 287. The statute contemplates a positive designation of the name of the contractor, if known. *Mayes v. Ruffners*, 8 W. Va. 386; *McElwee v. Sandford*, 53 How. Pr. 90; *Hooper v. Flood*, 54 Cal. 222. It only relieves a party claiming a lien from giving the name of the contractor when it is not known to him. *Kelly v. Laws*, 109 Mass. 396. Where the statute requires it, the name of the contractor, if known, must be stated; and, if the name of the contractor is unknown, that fact ought to be stated. Phillips on Mechanics' Liens, sec. 345, *et seq.;* 2 Pac. 50, *supra.* (3) The lien only exists "by virtue of any contract with the owner or proprietor." Revised Statutes, 1889, sec. 6705; *Horton v. Railroad*, 84 Mo. 602; *Planing Mill Co. v. Amelia Brundage and husband*, 25 Mo. App. 268. (4) A petition which fails to state that the improvement was erected under a contract with the owner, is fatally defective. *Peck v. Bridwell*, 6 Mo. App. 451; Revised Statutes, 1889, sec. 6712. The allegation in the lien that Cahill, Collins & Co., under a contract with Hanley & Keraghan, furnished certain materials for a building, of which L. B. Ely

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was owner, does not allege nor show that Hanley & Keraghan were the original contractors, nor does it show any contractual relation with Ely at all, and is fatally defective. *Warren v. Quade*, 29 Pac. Rep. 827; *Barker v. Berry*, 8 Mo. App. 446; *Merriman v. Headley*, 26 N. W. Rep. 728; *Keller v. Houlihan*, 21 N. W. Rep. 729; *Anderson v. Knudson*, 22 N. W. Rep. 302; *Rugg Hoover*, 10 N. W. Rep. 473; *O'Neil v Anderson*, 4 N. W. Rep. 47; *v. Malther v. Falcon Mining Co.*, 2 Pac. Rep 50; *Mfg. Co. v. Wilson*, 29 Pac. Rep. 829.

*Geo. N. Elliott* and *J. F. Graham* for respondents.

The lien filed is sufficient. It is not claimed that the name of the contractor is not given in the lien, but that the lien does not allege that the contractor so named had a contract direct with the owner, Ely. It is not necessary to make such allegation in the lien. Revised Statutes, 1889, sec. 6709; *Simmons, Garth & Co. v. Carrier*, 60 Mo. 581; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47; *McDermott v. Claas*, 104 Mo. 14.

SMITH, P. J.—This was an action on a mechanics' lien. The plaintiffs had judgment in the court below, and the defendants have appealed.

It appears from the record before us that at the trial, the plaintiffs, to sustain the issue in their behalf, gave in evidence the lien papers, on which the action was founded, in which it was stated that plaintiffs furnished the materials to the Hanly Kerraghan Plumbing and Gas Fitting and Heating Company for certain improvements on the real estate therein described, of which the defendant Ely was the owner, and that such materials were used in making the improvements.

The defendant objected to the introduction of this paper on the sole ground that it did not allege nor show

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who *was the original contractor, nor that any contract was made with the owner of the building.* The action of the trial court in overruling defendant's objection is made the basis of the appeal here. It is contended that since the lien paper does not, in direct and express terms, describe or mention any person, or persons, as "the contractor," that it is insufficient.

Section 6709, Revised Statutes, provides: "It shall be the duty of every original contractor within six months, and every journeyman and day laborer within sixty days, and every other person seeking to obtain the benefit of the provisions of this article—article 1—within four months after the indebtedness shall have accrued, to file with the clerk of the circuit court of the proper county a just and true account of the demand due him or them after all just credits have been given, which is to be a lien upon such buildings or other improvements, and a true description of the property, so near as to identify the same, upon which, the lien is intended to apply, with the *name of the owner or contractor, or both*, if known to the person filing the lien, which shall in all cases be verified by the oath of himself or some credible person for him."

It is seen from the above quoted provision of the statute, that the lien paper shall give "the name of the contractor." It will be further observed that the lien paper in question states that the work and labor done and materials furnished, was under a contract by plaintiffs with the Hanly Kerraghan Plumbing and Gas Fitting and Heating Company, also a defendant, for a two-story brick block of buildings which, with the lots on which the same were situate, was owned by defendant Ely. It is insisted that the Hanley Kerraghan Plumbing and Gas Fitting and Heating Company are not described as "the contractor." If this descriptive term had immediately followed that of the name of this

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company in the lien paper the designation, no doubt, would have been unexceptionable. The statute does not require the lien paper to state that "the contractor" is the original contractor; it is sufficient if it state the names of the contracting parties with whom plaintiffs agreed to do the work and furnish the materials. *Downey v. Higgs*, 41 Mo. App. 215. While the statute requires the lien paper to give the name of the owner, it no where requires that such lien paper state that "the contractor" made a contract with the owner. We think it is about as plain as anything can be that it may be fairly inferred from the facts expressly stated in the lien paper, that Hanly Kerraghan Plumbing and Gas Fitting and Heating Company, to whom the work and labor and materials were furnished for the defendant's improvements, were "the contractors "

The statute, section 6712, requires that the petition in an action on a mechanics' lien, among other things, shall allege the facts necessary for sueing the lien under article 1; and it was held in *McDermott v Class*, 104 Mo. 14, that the giving of the name of a person, and designating him as the party from whom the account is due, is a designation by inference that such person is "the contractor," and that a petition showing this is sufficient. There is no reason why, if such a statement is sufficient in a petition on the lien, that a like statement in the lien paper itself is not also sufficient to entitle the party furnishing the labor, or materials, to the beneficial provisions of the statute in relation to mechanics' liens.

The lien paper gave the owner all the information necessary to protect himself. It informed him of the nature of plaintiff's claim, what the items were, the name of the contractor to whom furnished and for what purpose. This, we think, was all that any fair

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and reasonable construction of the statute ought to require.

It follows that the judgment should be affirmed, which, with the concurrence of the other judges, is ordered accordingly.

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ERATH & FLYNN, Respondents, v. R. K. ALLEN & SON *et al.*, Appellants. 55 107 79 115 80 447

**Kansas City Court of Appeals, November 20, 1893.**

1. **Principal and Sureties:** STRICT CONSTRUCTION. The obligations of sureties are to be strictly construed and their liabilities are not to be extended by implication; and a statute prescribing their liabilities must be strictly construed.

2. **Construction:** NEBRASKA STATUTE PROVIDING BOND FOR MECHANICS, ETC.: SUBCONTRACTOR. The Nebraska statute requiring county boards to take from contractors erecting public buildings a bond for "the payment of all laborers and mechanics for their labor, etc.," does not include subcontractors, and an action cannot be maintained against the sureties on such bond by a subcontractor for a balance due him from the principal contractor, for material furnished and wages paid to laborers.

2. ———: ———: SUBROGATION. A subcontractor who has paid wages to laborers cannot be subrogated to the rights of such laborers so as to maintain an action on the bond against the sureties thereon, as the statute confers a mere personal privilege or right upon the laborors, which is in no sense assignable.

*Appeal from the Buchanan Circuit Court.*—HON. HENRY M. RAMEY, Judge.

REVERSED.

*B. R. Vineyard* and *Dowe, Johnson & Rusk* for appellants.

(1) Sureties are the favorites of the law. Their obligations are to be strictly construed, and their liabilities are not to be extended by implication. *The*

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*City of Harrisonville v. Porter*, 76 Mo. 358; *Blair v. Ins. Co.* 10 Mo. 566. (2) Only laborers and mechanics were protected by the bond in evidence. Plaintiffs were subcontractors, and not laborers or mechanics. The provisions of the bond do not extend to them. *Groves v. Railroad*, 57 Mo. 304; *Avery v. Ionia County*, 39 N. W. Rep. 742; *Duncan v. Bateman*, 23 Ark. 327; *Farmers' Loan and Trust Co. v. Railroad*, 26 N. E. Rep. 785; *Merriman v. Jones*, 44 N. W. Rep. 527; Phillips on Mechanics' Liens [2 Ed.], secs. 36, 41, 44 and 45; *Shields v. Morrow*, 51 Texas, 393; Compiled Statutes of Nebraska, 1889, ch. 54, p. 568, secs. 1 and 2; *Winder v. Caldwell*, 14 Howard, 434. (3) A mechanics' lien is a mere personal right, and is not assignable. Plaintiffs voluntarily paid their laborers, who were protected by the bond, not because of such protection, but because plaintiffs were bound to pay them. They are not subrogated to the rights of said laborers or mechanics under the bond. *Griswold v. Railroad*, 18 Mo. App. 52; *Brown v. Railroad*, 36 Mo. App. 458; *Tewksbury v. Bronson*, 4 N. W. Rep. 749; 2 Jones on Liens, secs. 1493, 1494.

*Crysler, Caskadon & Stearns* and *E. J. Sherlock* for respondents.

(1) As to whether a mechanic's lien is a personal right, or not, never arose in this case, nor is any ruling on such question assigned an error. 97 Mo. 68. (2) As to whether it is assignable, or not, is not presented by the pleadings, nor was it passed on by the court below, nor is it an issue in this case, nor is any action of the court thereon assigned as error. 39 Mo. App. 311. (3) That as to whether the plaintiffs are subrogated to any rights their laborers may have had against the said bond, the appellants say that no question of

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subrogation is presented by the pleadings or motions for a new trial, and no such question was ever passed on by the trial court. *Claflin v. Sylvester*, 99 Mo. 276. (4) The bond sued on sustains the same relation to the laborer, mechanic, material man, contractor or subcontractor in the erection of a public building that the state lien law does to the same persons in ordinary cases. In the erection of a public building there is no lien, but the bond must answer for the shortcomings of the contractor to any person whom he has failed to pay. The case of *Griswold v. Railroad*, 18 Mo. App. 52, and *Brown v. Railroad*, 36 Mo. App. 458, are utterly different from the case at bar, and are no authority in this case. Here the action is founded on a bond given under the provisions of an act to cover a case wherein the lien law does not apply; the action here is to recover an unpaid balance due from a contractor for labor performed on a building to which the lien law does not apply. There is nothing parallel in any of the cases cited under this head with the case at bar.

SMITH, P. J.—This is an action to recover a penalty in a bond. It seems from the record before us that R. K. Allen & Son entered into a written contract with the board of county commissioners of the county of Jefferson, in the state of Nebraska, to do all the work and furnish all the material for the proper construction and completion of a court house and jail building for said county, in accordance with the plans, elevation, sections and detail drawings, and in the manner specified in the specifications, for which the commissioners were to pay Allen & Son $54,800, etc.

The statute of the state of Nebraska, 1891, section 2172, provides: "It shall be the duty of the board of public lands and buildings, boards of county commissioners, the contracting board of officers of all cities and villages and all public boards now or hereafter in

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power by law, to enter into a contract for the erecting and finishing, or the repairing of any public building, bridge or other public structure to which the general provisions of the mechanics' lien laws do not apply, and where mechanics and laborers have no lien to secure the payment of their wages, to take from the person or corporation, to whom the contract is awarded, a bond with at least two good and sufficient sureties, conditioned for the payment of all laborers and mechanics for labor that shall be performed in the erecting, furnishing or repairing of the buildings or in performing the contract; said bond shall be to the board awarding the contract; and no contract shall be entered into by such board until the bond herein provided for has been filed with, and approved by, said board. The said bond shall be safely kept by the board making the contract, and may be sued on by any person entitled to the benefit of this act. The action shall be in the name of the party claiming the benefit of the act."

Accordingly, Allen & Son entered into a bond with the other defendants, Wyeth and Uhlman, as sureties thereon in the sum of $15,000, conditioned as required by the above recited statute.

Afterwards the plaintiffs entered into a written contract under Allen & Son, by which the former agreed to do all the work and furnish all the material for the proper construction and completion of the cut stone and rubble work in said building, in accordance with the plans, elevations, sections and detail drawings of the architect thereof, for $20,100, ninety per cent. of the material furnished and labor performed and permanently put in place to be paid for from time to time as the work progressed on the estimates of the architect, etc.

It appears further that the plaintiffs proceeded to furnish the materials and do the work as they had con-

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tracted to do, and received of Allen & Son therefor from time to time payments which in the aggregate amounted to the contract price, less the sum of $1,143, which the plaintiffs claim remained unpaid at the time the said buildings were paid for and accepted by the commissioners. There is some claim made by the defendants that the building was left by plaintiffs in an unfinished condition and that the defendants, Allen & Son, were compelled to finish the same at their own expense. However this may be, the amount of such expense was small and, in the view we shall take of the of the case, is unimportant. The suit is brought on the bond given to the commissioners to recover the amount which Allen & Son were behind with plaintiffs on their subcontract.

In this connection it may be proper to state that during the time the plaintiffs were performing their part of said contract with Allen & Son, they employed themselves in superintending the getting out of the stone and the placing of the same in the buildings, taking sometimes the part of a hand in both getting out and preparing the material and doing the work on the building. The plaintiffs, it appears, paid the laborers and mechanics the wages due on account of the work done by them on the buildings.

The court, against the objections of the defendants, gave for plaintiff an instruction telling the jury that by the terms of the contract read in evidence between Allen & Son and the commissioners in charge of the construction of the court house at Fairbury, Nebraska, it was the duty of said Allen & Son to pay the laborers and mechanics employed on said building for labor performed and services rendered in the construction thereof; that by the terms of the bond read in evidence, the defendants, Uhlman and Wyeth, upon default of Allen & Son to pay laborers and mechanics engaged in

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constructing said building, became, and are, liable for all sums due laborers and mechanics engaged in the construction of said building, not exceeding the amount of the balance claimed by plaintiffs in the evidence as the agreed balance due to them; and if you find from the evidence that plaintiffs, as mechanics under their agreement with Allen & Son, necessarily employed laborers to work on the stone work of said building; that defendants, Allen & Son, have been paid in full for the construction of said building; that they have failed to pay the laborers and mechanics employed by plaintiffs in full for the work done by them and services rendered in constructing said building; that plaintiffs, as such mechanics, were compelled to, and did, advance money and pay said laborers the balance due on account of their labor and services rendered, then the jury will find for plaintiffs and against all the defendants for such sum as you find, from the evidence, remains due plaintiffs on account of such labor and services rendered not exceeding the sum of $1,143.58, the amount claimed by plaintiffs, together with six per cent. interest from the date the same was demanded from defendants, Allen & Son.

The court refused to instruct the jury that, under the pleadings and evidence, the jury should find for defendants, Uhlman and Wyeth. The verdict and judgment were against all of the defendants, who have brought the case here by appeal.

Several questions have been discussed in the briefs of counsel in this case, but we shall only consider that of them which we think is decisive of the case, namely, the liability of Wyeth and Uhlman, the sureties on the bond of Allen & Son to the commissioners.

The plain meaning of the statute of Nebraska, already quoted, is that the commissions shall, in cases where *mechanics and laborers* have no lien to secure the

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payment of *their wages*, take from the person to whom the contract is awarded a bond with at least two good and sufficient sureties, conditioned for the payment of the wages of all laborers and mechanics for labor performed in erecting the building or performing the contract. The bond in question is not broader or more comprehensive in its scope than the statute provided it should be. The liability of the sureties depends upon the construction of the language of the statute authorizing the bond. The bond, it is seen, is one of indemnity provided by the statute for the benefit of *laborers and mechanics*. If the plaintiffs are persons falling within either or both of these statutory designations, then they are entitled to the benefit of the indemnity.

The obligations of sureties, it has long ago been decided in this state, are to be strictly construed, and their liabilities are not to be extended by implications. *Blair v. Ins. Co.*, 10 Mo. 566; *Harrisonville v. Porter*, 76 Mo. 358. The statute under consideration, as against the sureties on the bond sued upon, must be strictly construed.

It is to be conceded the plaintiffs were the subcontractors of the principal contractors. The former agreed with the latter for a specific amount to furnish the materials and do the work on certain part of the buildings according to the plans and specifications of the architect which were made part of the contract of Allen & Son with the commissioners. The pertinent inquiry now is, whether this statute makes any distinction between a "mechanic" or "laborer" and a "subcontractor," whose undertaking is like that of the plaintiffs in this case. It is very manifest that if the $15,000 indemnity provided by the bond is for the benefit of a subcontractor who furnishes material, as well as performs labor, that in a case like this, where



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the material furnished is of larger value, the entire indemnity may be appropriated to his use, and thus preclude the laborers and mechanics who worked on the building by the day for the contractors, or any of their subcontractors, from a participation in its benefits. The bond certainly does not provide any protection for a material man, whether he be or not a laborer or mechanic, who has done work, as well as furnished the material.

But it is insisted that the converse of this is true, that is to say, that a laborer or mechanic, though a subcontractor, furnishing materials, who has performed labor, either in procuring material or in placing and fitting it in the building, is a "mechanic" or "laborer" within the meaning of the statute. But this contention, we think, cannot be sustained, as will appear by reference to some of the adjudged cases construing similar statutes. Section 10 of the statute concerning railroad companies (Wag. Stat. 302) provided that "as often as any contractor, etc., shall be indebted to any *laborer* for thirty days', or any less number of days', labor performed, etc., such laborer," etc. In *Groves v. Railroad*, 57 Mo. 304, it was declared that a construction of the above language could not be made to include those who furnished teams and wagons and *drivers hired by them to haul and deliver stone or other material in the construction of the road.* It was declared further that this statute was intended for these poor laborers, who are dependent upon their own manual labor for their daily support, against the fraud or insolvency of irresponsible contractors, citing *Balch v. Railroad*, 46 N. Y. 551.

*Avery v. Supervisor*, 71 Mich. 538, was a suit by a subcontractor on a bond given under a statute very analogous to the one here. There the requirement of the statute was that the bond taken with security should

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be for "the payment by the contractor and all subcontractors for all labor performed or materials furnished," etc. The court, in the construction of this statute, say that the plaintiff did not claim to have entered upon the work under this contract, in reliance upon the facts that the bond provided by statute had been given. The object and purpose of the statute was the protection of the labor and material man; those who furnished material to be used in building, without reference to plans and specifications, and furnished either to the principal contractor or subcontractor and labor done for either. The subcontractor is an under contractor —one who takes under the original contract and presumably with knowledge of the terms and conditions of the original contract. This bond is not required by the statute for the protection of that class, but to protect material men and laborers at the hands of the contractor and subcontractor.

In Indiana it has been declared that there is a marked and enforced distinction between subcontractors and laborers. *Farmer L. & T. Co. v. Railroad*, 127 Ind. 250; *Barker v. Buell*, 35 Ind. 297; *Colter v. Frese*, 45 Ind. 96.

In Georgia, under the acts giving to "masons" and "carpenters" a lien for their work and materials found by them, they must, to entitle themselves to the benefit of the act, have contracted in that capacity. *Pitts v. Bomar*, 33 Ga. 96.

In harmony with the doctrine of the aboved referred to cases are *Shields v. Morrow*, 51 Tex. 393; *Huck v. Gaylord*, 50 Tex. 578; *Duncan v. Bateman*, 23 Ark. 327.

The conclusion to be deduced from these cases is, that a subcontractor is no more a "mechanic" or "laborer" than the principal contractor, and that the beneficial provisions of the statute relied on in this

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case cannot be invoked by the plaintiffs. They are subcontractors, and are to be distinguished from the the two classes of persons named in the statute, and for whose benefit alone the statutory indemnity is provided.

And, even though the plaintiffs paid off the laborers and mechanics employed by them in executing their subcontract, there is no principle upon which they can be subrogated to the rights of such laborers and mechanics. The statute conferred a mere personal privilege or right upon them, which was in no sense assignable. *Griswold v. Railroad*, 18 Mo. App. 52; *Brown v. Railroad*, 36 Mo. App. 458; *Tewksbury v. Bronson*, 4 N. W. Rep. 749; Jones on Liens, secs. 1493, 1494.

It, therefore, inevitably follows that the petition not only failed to state a cause of action, but the theory upon which the case was submitted to the jury by the plaintiff's instruction was an erroneous one, and should not have been given. The defendant's instruction in the nature of a demurrer should have been given. The judgment of the circuit court must be reversed. All concur.

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J. P. GALLAHER, Appellant, v. J. FRANCIS SMITH, Respondent.

**Kansas City Court of Appeals, November 20, 1893.**

1. **Municipal Corporations:** ORDINANCE REFERRING TO ANOTHER ORDINANCE. A special ordinance directing the construction of a sidewalk ordered it to be constructed in the manner and of the material named in a certain section of a general ordinance, relating to sidewalks. *Held,* such section of the general ordinance was thereby made a part of the special ordinance.

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2. ——: DELEGATION OF LEGISLATIVE AUTHORITY: PINE OR OAK SIDEWALK. An ordinance provided that a sidewalk might, at the option of the contractor, be constructed of pine, white or burr oak of certain demensions. *Held*, the ordinance was not void, and did not constitute a delegation of legislative authority, distinguishing *Galbreath v. Newton*, 30 Mo. App. 380, and *Ruggles v. Collier*, 43 Mo. 353.

*Appeal from the Buchanan Circuit Court.*—HON. HENRY M. RAMEY, Judge.

REVERSED AND REMANDED *(with directions)*.

*Kelley & Kelley* for appellant.

(1) The certified tax bill in any action thereon shall be *prima facie* evidence of the validity of the bill, of the doing of the work, and of the furnishing of the materials charged for, and of the liability of the property to be charged, stated in the bill. 1 Revised Statutes, 1889, sec. 1407; *Keith v. Bingham*, 100 Mo. 300; *Hernan v. Payne*, 27 Mo. App. 481; *Adkins v. Railroad Co.*, 36 Mo. App. 652; *Ess v. Bonton*, 64 Mo. 105; *Stifel v. Dougherty*, 6 Mo. App. 441; *Wand v. Green*, 7 Mo. App. 82; *Seibert v. Allen*, 61 Mo. 482. (2) The court erred in overruling plaintiff's motion for a new trial. There was no defense whatever to plaintiff's action on the special tax bills. The ordinances, contract, advertisement, etc., given in evidence by the defendant, not only do not impair the plaintiff's *prima facie* case made by the tax bill, but they strengthen it by showing a full compliance with all the requirements of the statute and ordinances. A substantial compliance is all that is required. There must have been a fair compliance with all the conditions precedent, whether prescribed by ordinance or statute, but slight variance will not defeat a tax bill. *Cole v. Skrainka*, 105 Mo. 308; *Shehan v. Owen*, 82 Mo. 458; 100 Mo. 22; *City of St. Joseph v. Anthony*, 30 Mo. App.

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538; *Clapton v. Taylor*, 49 Mo. App. 117. (3) The ordinances under which the work was done and the tax bills sued on were issued, are in due form, and valid to authorize the tax bills. Apportioning the cost of local improvement among lot owners in proportion to the frontage is a legitimate method of procedure. *Rutherford v. Hamilton*, 97 Mo. 543. It is competent to authorize the city engineer by ordinance to cause sidewalk to be repaired from time to time as may be deemed necessary. *The City of Kansas v. Huling*, 87 Mo. 203; *Carlin v. Cavender*, 56 Mo. 286. (4) The court erred in admitting evidence as to materials to be used by and under contract and ordinances, and which was objected to as being incompetent to vary or affect the contract or affect the tax bills.

*Luke H. Moss* and *Carolus & Brewster* for respondent.

Special ordinance 1402, under which plaintiff did the work sued for, simply orders the work to be done, and refers to general ordinance 356 for the manner of doing it, as well as the material to be used. General ordinance 356 is simply a classification ordinance defining three different classes of sidewalks. Section 2, of general ordinance 356, to which reference is made in special ordinance 1402, says, among other things, that a second-class walk should be built (either) of plank sawn from sound pine, white or burr oak timber, with stringers, etc., of either of these materials; that certain spaces should be filled with (either) cinders, broken stone, gravel, bluff (dirt) or other material. The law says: (Revised Statutes, 1889, sec. 1404). "The common council shall have power to cause sidewalks to be constructed at such time and to such extent, and of such dimensions and with such materials, etc., as

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shall be provided by ordinance." If this is open to construction it means that the council shall specify the material to be used in each instance, and that this this choice of material shall not be left to the fancy of the engineer or contractor. In the wisdom of the common council, a sidewalk made of pine, with cinders, broken stone, etc., for filling, might be durable and safe for the public travel on one street, while on another white oak would be necessary; and on still another, burr oak. *Galbreath v. Newton*, 30 Mo. App. 380; *City of St. Joseph ex rel. v. Wilshire*, 47 Mo. App. 125; *Ruggles et al. v. Collier et al.*, 43 Mo. 353; *City of St. Louis to use v. Clemens*, 43 Mo. 395.

GILL, J.—Plaintiff, as contractor with the city of St. Joseph, constructed a second-class sidewalk on Sixteenth street in said city, and in front of five lots owned by defendant Smith. In payment the contractor received five special tax bills; and it was to enforce the same against defendant's lots this action was brought. The trial court held the ordinance providing for the work, to be invalid, for the alleged reason that it is not therein provided of what materials the walk should be built, etc. From a judgment in defendant's favor, plaintiff appealed.

The special ordinance providing for the work ordered a second-class sidewalk to be constructed in the manner and of the material named in section 2 of general ordinance number 356. Said section 2 defines second-class sidewalks, and provides with much detail how they shall be built, demanding, among other things, that they shall be constructed of "plank four feet long, not less than six inches wide and two inches thick, sawn from sound pine, white or burr oak timber; shall be laid across and upon two sleepers of sound pine, white or burr oak scantling four inches in size and not

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less than twelve feet in length, etc., and the space included between the stringers, sleepers or scantling and the property and roadway lines respectively shall be filled with cinders, broken stone, gravel, bluff, or other material approved by the city engineer," etc. No question is made as to the character of the work done by the plaintiff—the walk was laid to the satisfaction of the city's engineer, and tax bills were issued therefor. The contractor used pine lumber both for the stringers and the covering and filled in with "*bluff*" (which seems to mean clay or dirt taken from the hills.)

The city of St. Joseph is a city of the second class, and its city council derives its authority for doing such work from section 1404, Revised Statutes 1889, and that portion which is necessary to be here quoted reads: "The common council shall have power to cause to be constructed, reconstructed or otherwise improved and repaired all * * * sidewalks * * * within the city, at such time and to such extent, and of such dimensions, and *with such materials* and in such manner, and under such regulations as shall be provided by ordinance," etc.

From the foregoing statement it will be seen that the ordinance directing the construction of the sidewalk in question is only complete by reference to the section of another general ordinance. Section 2 of such general ordinance becomes then as a part of the special ordinance. The case then stands as if the special ordinance ordering this particular work had directed the sidewalk in question to be constructed of "plank four feet long, not less than six inches wide and two inches thick, sawn from sound pine, white or burr oak lumber, and shall be laid upon and across two sleepers of sound pine, white or burr oak scantling four inches in size," etc.

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The ordinance and contract (which used the same words in detailing the material to be used) clearly left it to the option of the contractor to use either pine or oak lumber in building the sidewalk. Was the ordinance for that reason void? In support of the judgment below, it is insisted that the ordinance fails to designate the *materials* from which the walk was to be constructed, but left the decision of that matter with the contractor, thereby delegating the legislative powers of the common council to another. If counsel are correct in this assertion, then clearly the ordinance is void; for it is a well settled principle of law that such legislative powers given to the municipal authorities by the legislature cannot be delegated to another. But we cannot give our assent to the contention that there was such a delegation of legislative judgment as will avoid the ordinance. The council has not failed to designate the material. The ordinance, with much minuteness of detail, has prescribed the length, breadth and thickness of the lumber, how laid and how ballasted, and then has in effect said to the contractor, "we are indifferent whether you use pine or oak—either will answer." The council has exercised its judgment and declared in effect that there can be no choice between the two; and this is all that can be asked. The legislature entrusted the selection of the material to the wisdom and judgment of the council—to do in the matter as they thought best. It may be that, in the opinion of the council, pine and oak lumber were equally good for the purpose, and that by allowing the walks to be constructed of one or the other material a larger competition in bidding would be opened up, and the work therefore done at lower price. Legislative power implies judgment and discretion, it is true, upon the part of those who exercise it, and a special confidence and trust upon the part of those who

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confer it. But it seems to us that here the council has, according to its judgment, exercised that discretion, and has in a manner best suited to its judgment, specified what materials may be used in the construction of the sidewalks to be built within its jurisdiction. While, then, we yield to the abstract principles of law for which defendant's counsel contend, we yet fail to see wherein they defeat the ordinance in question. This is quite a different case from that of *Galbreath v. Newton*, 30 Mo. App. 380. The difficulty there was not in the failure of the ordinance to name the material, but that the contract entered into by the city engineer went beyond the requirements of the ordinance, and permitted the substitution of one material for that named in the ordinance. We there held that the engineer had no such authority, and that he must conform his contract to the ordinance. Neither is this a parallel case to that of *Ruggles v. Collier*, 43 Mo. 353, and others of like kind cited by counsel. In *Ruggles v. Collier* an ordinance of the city of St. Louis purported to leave it to the discretion of the mayor alone to improve streets within a certain limit, when and where, and of such materials as he should think proper. This was held to violate the city charter, as by the ordinance the city council had attempted to delegate to the mayor a discretion which the legislature had conferred on it *and* the mayor.

Cases may arise where from the face of the ordinance it may appear that the council has abandoned the exercise of its judgment and discretion, and reposed the performance of its duties on another. When an instance of that kind is presented it will be, doubtless, our province to condemn it and declare the ordinance void. But we do not regard this as a case of that kind. We think the council, in the matter in hand, did exercise its judgment and discretion, and did not delegate it to another. We thus remark in answer to the printed

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argument of defendant's counsel wherein extreme cases are put—far beyond the facts appearing on this record.

The judgment was for the wrong party. It will, therefore, be reversed and remanded to the trial court with directions to enter judgment in plaintiff's favor for the amount of the tax bills, interest and costs. All concur.

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JOSEPH DILLY, Respondent, v. OMAHA & ST. LOUIS RAILWAY COMPANY, Appellant.

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**Kansas City Court of Appeals, November 20, 1893.**

1. **Railroads:** KILLING STOCK: EVIDENCE. *Held,* the reasonable inference to be drawn from all the evidence in the case, was that the injury to plaintiff's stock occurred in Benton township.

2. ———: ———: RESTRAINING SWINE: HARMLESS ERROR: APPELLATE PRACTICE. Instructing the jury that the law restraining swine was in force in the county where the injury occurred, is harmless, and not reversible error.

3. **Appellate Practice:** EVIDENCE: REASONABLE INFERENCE. In considering the sufficiency of evidence to go to the jury, the appellate court must allow it the weight, which every reasonable inference can properly give it.

4. **Railroads:** KILLING STOCK: ATTORNEYS' FEE: MOTION IN ARREST. The attorney's fee allowed by the statute is an issue of fact for the jury, which cannot be waived, except by written consent, or oral consent in open court entered on the minutes, and advantage can be taken of the failure to submit it to a jury by motion in arrest, though no objection be made except in such motion.

5. ———: ———: COSTS. As defendant was compelled to appeal to be relieved of the error in assessing a fee for plaintiff's attorney, the docket fee will be taxed against the respondent.

*Appeal from the Daviess Circuit Court.*—HON. CHAS. H. S. GOODMAN, Judge.

AFFIRMED, in part; REVERSED AND REMANDED in part.

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*Ed. E. Aleshire* for appellant.

(1) The court erred in refusing to give defendant's instruction number 6, at the close of the evidence. Under the law and the evidence, plaintiff was not entitled to judgment. As has been repeatedly said by all of the courts of this state, "It has been for a long time the settled law in this state that it is not only necessary to aver these facts, but also to establish them by proof at the trial." *Manuel v. Railroad*, 19 Mo. App. 631; *Palmer v. Railroad*, 21 Mo. App. 437; *Backenstoe v. Railroad*, 23 Mo. App. 148; *Harris v. Railroad*, 23 Mo. App. 328; *Wiseman v. Railroad*, 30 Mo. App. 516; *Kinion v. Railroad*, 30 Mo. App. 573; *Jewett v. Railroad*, 38 Mo. App. 48; *Nickerson v. Eddy & Cross*, receivers, 50 Mo. App. 569; *Mitchell v. Railroad*, 82 Mo. 106; *Backenstoe v. Railroad*, 86 Mo. 492; *King v. Railroad*, 90 Mo. 520; *Briggs v. Railroad*, 111 111 Mo. 168. (2) Instruction number 3 should not have been given for plaintiff, as there was no oral nor record testimony offered to show that the law restraining swine from running at large in Daviess county had ever been adopted. Courts cannot take judicial notice of the adoption of any special law by counties. This applies to the stock law, township organization, local option law, etc. *Foster v. Swope*, 41 Mo. App. 137; *State v. Mackin*, 41 Mo. App. 99; *City of Hopkins v. Railroad*, 79 Mo. 98; *State v. Hays*, 78 Mo. 600; *State v. Cleveland*, 80 Mo. 108. (3) The court erred in the refusal of defendant's instruction number 8. We have printed in the abstract every word of the evidence that in any way pertains to the manner in which the bay mare described in the complaint received her injury, and state that there is not a single statement contained in the evidence that can be construed so as to show this mare to have been injured by being frightened

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into the bridge, as were the dun horse and black mare. Plaintiff's own evidence discredits this theory, and as nearly all of his evidence showed the damage to this mare to be at least $20, it was manifest injustice to permit the jury to take into consideration the question raised by the instruction. (4) The court should have sustained defendant's motion in arrest of judgment. After the finding of the jury the court made the further order and finding, to-wit: "Ordered by the court that plaintiff be allowed an attorney fee of $35, to be taxed as other costs." The question of the value of the attorney's fees to be allowed in the case should have been submitted to a jury, unless that right was by some of the statutory manners waived, and in this case there was no waiver. *Briggs v. Railroad*, 111 Mo. 168. And the motion in arrest of judgment should have been sustained. *Scott v. Russell*, 39 Mo. 409; *Cox v. Moss*, 53 Mo. 433; *Tower v. Moore*, 52 Mo. 120; *Brown v. Railroad*, 37 Mo. 298.

*Thos. A. Gaines* and *Alexander & Richardson* for respondent.

(1) It is not necessary that the venue shall be proven by direct testimony. It is sufficient if it can be inferred from the facts and circumstances in proof that the injury occurred in the township alleged in the complaint. *Kinney v. Railroad*, 27 Mo. App. 610; *State v. Miller*, 93 Mo. 263; *Singer v. Dickneite*, 51 Mo. App. 245; *Reilly v. Railroad*, 94 Mo. 600; *Thorpe v. Railroad*, 89 Mo. 650; *Holmes v. Braidwood*, 82 Mo. 610; *Davis v. Brown*, 67 Mo. 313; *Cole v. Railroad*, 47 Mo. App. 624; *Blondeau v. Sheridan*, 81 Mo. 545. (2) The giving of instruction number 3, relative to the swine law being in force in Daviess county, if error, was a harmless error, which worked no injury to

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appellant. In the cases cited by appellant the question of the adoption of a city ordinance or of the local option law was a material issue in the case, and it was necessary to aver and prove that the local law was in force. In the present case it was entirely unnecessary to either aver or prove that the swine law was in force, and an instruction upon an immaterial matter will not constitute reversible error, unless it be shown that appellant was prejudiced thereby. *Orth v. Dorschlein*, 32 Mo. 366; *Hunter v. Miller*, 36 Mo. 143; *McLeod v. Skiles*, 81 Mo. 595; Elliott's Appellate Procedure, secs. 593, 632, 635; *West v. Camden*, 105 U. S. 507; *Morrow v. Railroad*, 17 Mo. App. 103; *Stanley v. Railroad*, 84 Mo. 625. (3) Where a question of fact is in issue and there is any evidence tending to prove it, it should be submitted to the jury. *Buesching v. Gas Light Co.*, 73 Mo. 219; *Nelson v. Board of Education*, 63 Mo. 137; *Smith v. Railroad*, 31 Mo. 287; *Bowen v. Lazalere*, 44 Mo. 383; *Grady v. Ins. Co.*, 60 Mo. 116. (4) The fifth point in appellant's brief, and the one mainly relied on by its counsel for the reversal of this cause, is that the court taxed an attorney's fee for plaintiff without calling a jury. The case of *Briggs v. Railway Co.*, 111 Mo. 169, is relied on by appellant and no doubt suggests the point, but we cannot agree with appellant's counsel that the case at bar is "squarely in line with it." In fact *Briggs v. Railway Company* falls very short of being decisive of this point. The order taxing the costs is not a part of the record proper, nor can it be made so except by bill of exceptions. The motion in arrest only goes to the record proper, while the taxation of costs is only incident to the judgment.

ELLISON, J.—This action was instituted under the provisions of sections 2611 and 2612, Revised Statutes, 1889, wherein an action is given for damages to stock

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which may go upon a railroad right of way by reason of there not being a sufficient fence, and are injured in ways other than by colliding with the train. Judgment was given for plaintiff, both in the justice's court and the circuit court. Defendant has brought the case here.

I. Defendant contends that there was no evidence tending to show the township in which the injury occurred. We think there was when it is all considered together. The reasonable inference to be drawn from all the testimony on this point, was that the injury occurred in Benton township.

Defendant further contends that the court committed error in instructing the jury that the law restraining swine was in force in Daviess county. There being no evidence on this subject the instruction should not have been given; but we accept the view presented by plaintiff's counsel in this regard, and hold that, under the testimony as applied to the law of the case, no possible injury resulted to defendant by reason of the instruction. When it is apparent that no harmful result can follow from an error, the holding has always been that it was not reversible error.

Again, defendant contends that its instruction number 8 should not have been refused. This instruction declared there was no evidence that the bay mare was injured as charged in the plaintiff's complaint, and that no damage for her injury should be allowed by the jury. We have examined the evidence on this point in connection with argument of counsel, and have concluded to rule it against defendant. The evidence, we agree, is not as satisfactory as it might have been, but at the same time, when we consider that we must allow it the weight which every reasonable inference can properly give it, we cannot do otherwise than sustain the action of the court in submitting this issue to the

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jury, and in also sustaining the jury's conclusion thereon; especially since the trial court refused to interfere therewith.

II. The next point of objection is based on the allowance of an attorney's fee of $35, under the provisions of section 2612, Revised Statutes, 1889. The trial court allowed the fee, without calling a jury, and without any waiver of a jury being entered by defendant as provided in section 2133. No objection was made to this by defendant, except by a motion in arrest. It was decided in *Briggs v. Railroad*, 111 Mo. 168, that a reasonable attorney's fee, as allowed by the statute aforesaid, was an issue of fact in the sense of the statute, section 2121, and that the parties were entitled to a jury, unless one was waived. It was furthermore decided in that case, that there could be no waiver, when the parties appeared, except by written consent filed with the clerk, or oral consent in court, entered on the minutes; and that advantage could be taken of this by motion in arrest. No waiver, as contemplated by that decision, was made in this case, and we must hold under that authority that error was committed against defendant. Plaintiff's counsel make a strong argument with citation of authority, against this view, but we are bound, under the constitution, to give the defendant the benefit of the last ruling of the supreme court.

The result is that we will affirm the judgment as to all things save that for the attorney's fee. As to the latter we will reverse the judgment and remand the cause for trial as to such fee. The costs of an abstract and other matters attending the branch of the case involving the attorney's fee is nominal. The appellant, however, was compelled (in a legal sense) to come to this court to be relieved of that error, and the docket

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fee which he has paid will therefore be taxed against respondent. All other costs will be taxed against appellant. All concur.

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JAMES ETHINGTON *et al.*, Respondents, v. DWELLING HOUSE INSURANCE COMPANY, Appellant.

**Kansas City Court of Appeals, November 20, 1893.**

1. **Insurance:** STIPULATION AGAINST CHANGE OF TITLE: UNPAID MORTGAGE DEBT. A mortgage existed at the time the insurance was effected, after the debt became due, and before it was paid, a loss occurred. *Held*, such default in payment did not avoid the policy under the stipulation therein, providing that any change in the interest, title or possession, etc., rendered it void.

2. **Mortgage:** EFFECT OF DEFAULT IN PAYMENT: SECURITY. Though, on failure to pay the debt according to the terms, the legal title passes to the mortgagee, yet the substantial interest remains where it was before the mortgage is still a mere security for the debt.

3. **Insurance:** CONSTRUCTION OF TERMS OF POLICY. In the solution of language of doubtful import, as it may appear in the policies of insurance, the courts will resolve the doubts in favor of the assured for the reason that such clauses are interjected into the policy for its protection and serve to qualify and restrict its main obligation; and in this case, it is assumed that the language was intended to have such meaning as people ordinarily affix to it.

*Appeal from the Daviess Circuit Court.*—HON. CHAS. H. S. GOODMAN, Judge.

AFFIRMED.

*Joshua F. Hicklin* and *Ed. E. Yates* for appellant.

(1) The demurrer to the defendant's answer should not have been sustained. By it the truth of every fact stated in the answer was admitted. The answer alleges that the title to the dwelling house insured was changed



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by virtue of the provisions of a certain deed of trust and the maturity of the debt thereby secured. The demurrer admits this to be true. The policy provides that change of title or interest of the subject of the insurance shall avoid the contract. Upon what theory of pleading, then, could the demurrer be sustained? (2) But, aside from this question of pleading and the fact that the court committed error in sustaining plaintiff's demurrer, our position on the merits of the case may be briefly stated thus: The fact that the mortgage debt became due and was permitted to so remain until after loss avoided the policy, because of the change of interest and title caused thereby. In this position we are fully sustained by the recent case of *Holloway v. Ins. Co.*, 48 Mo. App. 1, *loc. cit*, bottom 5, top 6. (3) What is the change in interest or title? Before default the mortgagor was the owner of the legal estate, not only as against third persons, but as against the mortgagee; after default, the legal title passed immediately to the mortgagee, or trustee for the mortgagee, as in this case, and the mortgagee then became entitled to immediate possession; could maintain ejectment and was entitled to the rents and profits to be applied to the extinguishment of the debt. This, we contend, worked a change in the interest or title of the assured strictly within the condition of the policy heretofore quoted. *Pease v. Iron Co.*, 49 Mo. 124; *Johnson v. Houston*, 47 Mo. 227; *Siemers v. Schrader*, 88 Mo. 23. If the law upon any one proposition of insurance law is well settled, it is to this effect, that, under a condition such as we have in our policy, a mortgage does work a change of interest. As passing upon the identical language in question, we cite *Olney v. German Co.*, 88 Mich. 94; s. c., 50 N. W. Rep. 100. As also fully sustaining this position. *Fire Co. v. Clarke*, 15 S. W. Rep. 166; 79 Tex. 23; *Sassman v.*

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*Pamlico Co.*, 78 N. C. 145; *Tatham v. Commerce Co.*, 4 Hun, 136; *Sherwood v. Agricultural Co.*, 73 N. Y. 447; *Germond v. Home*, 2 Hun, 540. To which might be added not a current, but a torrent, of like authorities.

*Alexander & Richardson* and *W. D. Hamilton* for respondent.

As to the sufficiency of the new matter set up in the answer to constitute a defense, we hold that the maturity of the debt secured by the trust deed, although the legal title to the premises, the subject of the insurance thereby vested in the trustee did not constitute a change in the interest, title or possession of the subject of nuisance, either by legal process, or judgment or by voluntary act of assured, within the meaning of the policy. In construing a condition of this character, if, upon a consideration of the whole contract, it is uncertain whether the language of the stipulation is used in an enlarged or a restricted sense, or, if it is fairly open to two constructions, one of which will uphold, and the other defeat, the claim of the insured to the indemnity which it was his object in making the insurance to obtain, that should be adopted which is most favorable to the insured, and most in harmony with such, the main purpose of the contract on his part. The reasons for this are twofold: the tendency of any such stipulation is to narrow the range and limit the force of the underwriter's principal obligation. *Loy v. Ins. Co.*, 24 Minn. 315 (34 Am. Rep. 346); *Hoffman v. Ins. Co.*, 32 N. Y. 405; *Westfall v. Ins. Co.*, 2 Duer, 495; *Ins. Co. v. Wright*, 1 Wall. 456; *Ins. Co. v. Cropper*, 32 Penn. St. 351. Forfeitures are odious to the law, and when policies are burdened with conditions rendering it exceedingly difficult for the assured to observe them, the courts will not strain for a construc-

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tion of these conditions that will defeat a recovery, but content themselves with giving the language a fair and reasonable construction. *Ins. Co. v. Walsh*, 54 Ill. 164; 5 Am. Rep 115; *Loy v. Ins. Co.*, 24 Minn. 315; 31 Am. Rep. 346; *Ins. Co. v. Lawrence*, 4 Metcalf, 9; 81 Am. Dec. 521; *Jackson v. Ins. Co.*, 23 Pick. 418; 34 Am. Dec. 69; *Ayers v. Ins. Co.*, 17 Iowa, 176; 85 Am. Dec. 553; *Assurance Co. v. Scammon*, 9 Am. St. Rep. (126 Ill. 355) 607; *Smith v. Ins. Co.*, 25 Am. St. (91 Cal. 323) 191; *Powers v. Ins. Co.*, 36 Am. Dec. (19 La. 28) 665; *Ins. Co. v. Hayes*, 19 Am. Dec. (17 Ohio St. 432) 628; *Ins. Co. v. Hoffman*, 125 Pa. St. 625; *Ins. Co. v. Vanlue*, 126 Ind. 410; *Ins. Co. v. Kelly*, 3 Am. Rep. (32 Md.) 149.

Gill, J.—This is an action to recover for the loss by fire of plaintiffs' dwelling house, on which defendant had issued its policy of insurance. The material part of defendant's answer was as follows: "Defendant admits that it did, on the nineteenth day of March, 1888, issue to plaintiffs its certain policy of insurance, by the terms of which it insured certain property, real and personal, in said policy described, said real estate being situated as described in plaintiffs' petition. That, among other things in said policy of insurance, it was expressly provided that *if any change takes place in the interest, title or possession of the subject of insurance*, whether by legal process or judgment, or by voluntary act of the insured, or otherwise, the entire policy, so issued to plaintiffs by defendant as aforesaid, shall be void.

"Defendant states that on the fifth day of January, 1887, plaintiffs made, executed and delivered their certain deed of trust conveying the real estate upon which was situated the dwelling house insured by said policy, to Thomas J. Jeffries, trustee, to secure a certain debt

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in said deed described, due two years from said date. That on the fifth day of January, 1889, said debt became due, and remained due and unpaid until after the alleged loss by fire complained of in plaintiffs' petition. That the title and interest of plaintiffs in and to said real estate, on said fifth day of January, 1889, became and was vested in the trustee in said deed of trust, and was by him held in trust for the beneficiary therein named from and after said date until the happening of said loss. Therefore defendant says that the title and interest of the plaintiffs in and to the said dwelling house, the subject of the insurance, became, and was changed within the meaning of the condition in said policy of insurance hereinbefore recited, and the said entire policy became at said date of the loss complained of, void and of no legal effect whatever."

The court sustained a demurrer to this answer, on the ground that it failed to state any defense, and the propriety of so doing is the question for our determination.

I. These facts are admitted by the demurrer: On March 19,1888, defendant issued its policy of insurance for the period of five years on plaintiffs' dwelling house. At that time there was a deed of trust on the real estate, executed in January, 1887, to secure a note of plaintiff due in January, 1889, and when the house was burned this incumbrance was past due and unpaid.

Now, the point is this: Did the subsequent default in failing to pay off the incumbrance which existed at the date of the policy, work such a change in the plaintiffs' interest, title or possession as to invalidate the policy under the provision that, "if any change take place in the interest, title or possession of the subject of insurance * * * then the entire policy shall be void?" We are clearly of the opinion that it did not.

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Defendant's counsel contends that by the failure of the plaintiff mortgagor to pay off and discharge the mortgage when due the title passed to the mortgagee, or trustee, and for that reason there was a change in the title and interest of the assured. But this contention is more technical than substantial. Admitting that when the mortgagor fails to pay the debt according to the terms of his promise the legal title passes to the mortgagee, yet the substantial interest in the property remains where it was before—in the mortgagor. The mortgage is, even after condition broken, merely a security for the debt. This passing of the technical legal title to the mortgagee when the mortgagor is in default is for nothing else but to protect the debt and to arm the mortgagee, or trustee, with the means of foreclosure. The mortgagee, or trustee, may on default proceed to utilize the security; may go on and sell the property or foreclose in court, as the case may be, or may even take possession and appropriate the rents to the liquidation of the debt. But, until he does so move, the mortgagor in possession substantially owns the property. He has, in the popular and ordinary use of the term, before and after condition broken, all the title and interest he had before maturity of the debt—that is, to pay off the claim and hold an absolute, unincumbered title.

In the solution of language of doubtful import, as it may appear in these policies of insurance, the courts will resolve the doubts in favor of the assured, for the reason that such clauses are interjected into the policy by the underwriter, and for its protection, and serve to qualify and restrict its main obligation. And if then the company desires to qualify or impair its obligation to pay the loss, it should use plain and unambiguous language. We will assume, too, that language, such as here used, was intended to have such meaning as

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people ordinarily affix to to it; and we think it unquestioned that it would never be considered that a mortgagor had lost his interest or title to the property simply because he had not paid promptly the debt as he had agreed. In support of the foregoing we refer to: *Loy v. The Home Ins. Co.*, 24 Minn. 315; *Hartford Fire Ins. Co. v. Walsh.* 54 Ill. 164–168; *Bailey v. Winn*, 101 Mo. 656; *Jackson v. Ins. Co.*, 23 Pick. 418; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 128.

Our conclusion, then, is that the matter set up in defendant's answer constituted no defense, and the trial court rightly sustained a demurrer thereto.

Judgment affirmed. All concur.

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JOHN D. COX, Respondent, v. ABIJAH W. BISHOP, Appellant. 55 135 92 629

**Kansas City Court of Appeals, November 20, 1893.**

1. **Appellate Practice:** FAILURE OF PROOF: NON EST FACTUM. Where the answer in an action on a written instrument presents the issue of *non est factum,* and there is no evidence tending to prove the signature, and the paper itself is not offered, there can be no recovery.
2. **Pleading:** ANSWER: CONSISTENT DEFENSES. *Non est factum* and nonperformance of the contract are not so inconsistent that they cannot stand together, the proof of one not necessarily disproving the other.

*Appeal from the Caldwell Circuit Court.*—HON. E. J. BROADUS, Judge.

REVERSED AND REMANDED.

*William A. Wood* for appellant.

(1) Defendant's verified plea of *non est factum*, denying all the allegations of plaintiff's petition,

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required plaintiff to introduce in evidence the instrument sued on and prove its execution by defendant; this was not done and for that reason the judgment is erroneous and ought to be reversed. Where the record shows an entire failure to prove a material averment of the petition, there can be no recovery. *Groll v. Tower*, 85 Mo. 249; *Brumley et al. v. Golden et al.*, 27 Mo. App. 160. (2) Defendant's general denial, verified by him and his second defense in the nature of failure of consideration were perfectly consistent and the second count of defendant's answer was not a confession of the alleged contract, or of its execution by defendant, or of its proper assignment to the plaintiff. *Patrick v. Gas Light Co.*, 17 Mo. App. 462; *Lee e. Dodd*, 20 Mo. App. 462; *Moore v. Bank*, 22 Mo. App. 685; *Wood v. Hilbish*, 23 Mo. App. 389; *Nelson v. Broadhack*, 44 Mo. 599; *McAdow v. Ross et al.*, 53 Mo. 199; *May v. Burk*, 80 Mo. 675; *Ledbetter v. Ledbetter*, 88 Mo. 60. (3) The second count of defendant's answer alleging that the conditions of the alleged contract filed in suit had never been performed and that the alleged contract was therefore void, was not a confession and not inconsistent with his verified general denial. He had a perfect right to show that the contract filed in suit was not his and had never been signed by him, also to show that its conditions had not been performed. He was entitled to avail himself of either or all of these defenses. *Ledbetter v. Ledbetter, supra; Nelson v. Broadhack, supra*; *Wood v. Hilbish, supra; Moore v. Bank et al., supra.*

*Crosby Johnson* for respondent.

(1) The answer is ambiguous, if it is to be treated as an attempt to deny the execution of the instrument sued on; and an ambiguous denial is to be taken as an

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admission. *Bredell v. Alexander*, 8 Mo. App. 110. (2) Where the answer contains a general denial and special pleas, it ought to be so framed as to leave no doubt in the minds of the court and the adverse party as to what is denied and what is admitted. *Long v. Long*, 79 Mo. 644. (3) The allegation in the answer that "the obligation filed with the plaintiff's petition became null and void after the expiration of January 1, 1891," is inconsistent with the theory that such instrument had never been executed and delivered, and was, from its inception, a nullity. *Sheehan v. Sims*, 36 Mo. App. 224; *Roberts v. Railroad*, 43 Mo. App. 287. (4) Haines Brothers performed the conditions prescribed by the contract in suit and could have recovered thereon, if they had not assigned same. *Railroad v. Tygard*, 84 Mo. 263; *Railroad v. Stockton*, 51 Cal. 334; *People v. Holden*, 82 Ill. 93.

Gill, J.—The petition in this case alleges the execution by defendant of a contract or promise in writing, which is filed with the petition, whereby said defendant agreed to pay Haines Brothers, plaintiff's assignors, or order, a certain sum of money, provided said Haines Brothers should on or before January 1, 1891, construct and complete a railroad from Kingston to some point either on the Hannibal & St. Joseph Railroad or the Milwaukee road.

By his answer, verified by affidavit, defendant denied the execution of the instrument sued on; and along with such denial, and in another clause of the answer, defendant alleged in defense a failure on the part of Haines Brothers to perform their part of the alleged contract, to-wit, that they did not build the railroad they had agreed to, etc.

The court tried the case without a jury, gave judgment for the plaintiff and defendant appealed.

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On account of the absence of any testimony on a material issue in the cause the judgment herein must be reversed. There was no evidence on the issue of *non est factum* interposed by the defendant in his answer. The action is founded on an instrument of writing charged to have been executed by the defendant; the answer verified by affidavit puts in issue the execution thereof, and there was an entire failure to introduce any evidence tending to prove the defendant's signature, nor was the paper itself offered. The very groundwork, then, of the complaint, was unproved, and hence there should not have been any recovery on the alleged cause of action.

The second count in the answer did not confess the execution of the writing sued on. The answer when all read together amounted to this: *First*, a denial under oath that defendant executed the written contract sued on, and, *second*, an allegation that Haines Brothers did not build the railroad as therein stipulated. These counts of the answer are not so inconsistent that they cannot stand together. The proof of the one does not necessarily disprove the other; and this, as uniformly ruled in this state, is the test of inconsistent defenses. *McCormick v. Kaye*, 41 Mo. App. 263.

The abstract is sufficient to present the question here considered.

Judgment reversed and cause remanded for a new trial. All concur.

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JAMES A. CHANDLER, Respondent, v. W. A. OLDHAM, Appellant.

**Kansas City Court of Appeals, November 20, 1893.**

**Lease:** CONSTRUCTION: SALE BY LANDLORD. A lease stipulated that in case of sale, the lessee was to have a fair valuation for any and all improvements made by him. The lessor sold, during the term, subject to all the lessee's rights under the lease. The lessee attorned to the purchaser and occupied the premises till the expiration of the lease, when he abandoned the premises and improvement and brought this action against his lessor for the value of the improvements. *Held,* he could not maintain the action, as the above stipulation was only intended to apply to a sale where the lessee's rights would not be protected.

*Appeal from the Boone Circuit Court.*—HON. JOHN A. HOCKADAY, Judge.

REVERSED.

*Wellington Gordon* for appellant.

(1) A fair construction of the contract as shown by the terms thereof, as also by the acts of the parties themselves, was that Chandler should receive from Oldham a fair valuation as pay for his improvements; *provided,* Chandler was not by reason of said sale in any manner prevented from the use and enjoyment of his slaughterhouse and pen for the whole period of six years. *Belch v. Miller,* 32 Mo. App. 387; *Lumber Co. v. Warner,* 93 Mo. 374; *Brewing Co. v. Water Works,* 34 Mo. App. 49. The evidence on the part of Oldham showed conclusively that in May, 1889, he sold his land, made a deed and at some time took the written agreement of his grantees, Nichols & Bergman, binding them to continue the lease of Chandler and protect him

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in his possession for the full six years. He advised Chandler of this agreement and Chandler expressed himself as satisfied and agreed to pay his rent to Nichols & Bergman, and to continue on in his lease as their tenant. To this arrangement Chandler says in his testimony he consented and paid his yearly rental to Oldham's grantees. This was clearly an admission on the part of Chandler that he did not claim damages by reason of Oldham's selling the property, and that he understood the contract as Oldham did—that in case of a sale of the land, if he was not disturbed in his posession he was not to be paid for his improvements. *Brewing Co. v. Water Works*, 34 Mo. App. 49; *Dobins v. Edmonds*, 18 Mo. App. 307; *Crawford v. Elliott*, 78 Mo. 497. Plaintiff at the end of his term had a right to remove all his improvements, as they were erected by him, to be used in his business and trade, and he had no right at the end of his term to abandon them and sue defendant for their value. *Bircher v. Parker*, 40 Mo. 118; 2 Taylor's Landlord and Tenant, sec. 551, pp. 111, 159; *Kuhlmann v. Meier*, 7 Mo. App. 260; 32, 161; *Clemmens v. Murphy*, 40 Mo. 121; *Bircher v. Parker*, 43 Mo. 443; *Seible v. Siemon*, 72 Mo. 526.

*Turner, Hinton & Turner* for appellant.

(1) Appellant's first contention seems to be that the trial court erred in failing to read into the contract, as made by the parties, an additional proviso, namely, that, in case of a sale of the leased premises, Chandler should only be paid for his improvements in the event that he should be evicted by Oldham's grantees before the expiration of six years. Certainly there is no such proviso in the contract itself; it first grants the premises to Chandler for the purpose of a slaughterhouse and fencing being erected thereon; second, provides

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for a yearly rental of $25 for the use of the ground, and that the lease should run at the option of Chandler for at least six years; third and last, that in case of a sale of the leased premises, Chandler should have a fair valuation for any improvements made by him, provided that nothing in the contract should be so construed as to prevent him from holding the lease for at least six years. This last is the only proviso in the contract, and it doubly secured to respondent the right to the possession of the leased premises for at least six years, sale or no sale. The obvious intention of the parties, as it appears in the contract, was that in case of a sale of the leased premises, putting it beyond Oldham's power to renew the lease, Chandler should be reimbursed for the reasonable value of the improvements. This, we take, is the only construction that can be gathered from the terms of the instrument itself. That the express terms of this contract could not be varied, nor additional conditions or provisions read into by aid from parol testimony, we take to be too well settled in this state to require the citation of authorities. *State ex rel. v. Hoshaw*, 98 Mo. 358; *Thompson, Payne & Co. v. Irwin, Allen & Co.*, 42 Mo. App. 403, and authorities cited at page 421. The authorities cited by counsel for appellant in the first section of his brief have no application to a case of this character. (2) The general law undoubtedly is that in the absence of a contract regulating the rights of the parties a tenant may remove certain kinds of fixtures placed upon the leased premises for his own purposes. But in this case the parties were operating under a written contract regulating this point, and not under the general landlord and tenant law, applicable only in the absence of contract. The contract itself provided that the tenant should be paid for his improvements in case of a sale of the leased premises, and hence precluded any idea of a right or

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duty to remove the improvements, even if this court would hold that a slaughterhouse on a stone foundation, fenced with barbed wire fencing, and a stone-curbed spring were the proper subjects for removal under the doctrine invoked by appellant. Tiedeman on Real Property [1 Ed.], sec. 176, p. 111; *Iron Works v. Hitt*, 49 Mo. App. 472.

GILL, J.—This controversy arose out of about the following state of facts: Defendant Oldham was the owner of forty acres of land north of and immediately adjoining Columbia. Plaintiff Chandler, a butcher, desired the use of about an acre of this land for slaughtering purposes, and after some negotiating the following written agreement was entered into:

May 1, 1886.

"Articles of agreement between W. A. Oldham, of the first part and J. A. Chandler of the second part: J. A. Chandler is to have privilege of building slaughterhouse on pasture of said Oldham, north of Columbia, on gravel road and to inclose a lot with suitable fencing. For this privilege said Chandler is to pay the sum of $25 per year, the lease to run at the option of Chandler, for at least six years. In case of sale of said property, Chandler is to have a fair valuation for any and all improvements made by him, provided that said Chandler shall not by anything in this article, be prevented from holding the lease for at least six years.

"W. A. OLDHAM,
"J. A. CHANDLER."

Before the expiration of this ground lease, and when about three of the six years yet remained, Oldham sold the pasture land above mentioned to Nicholds & Bergman; but in making the sale, the leasehold interest of Chandler was, by agreement between Oldham

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and Nichols & Bergman, saved and left undisturbed. Chandler was informed of the change of ownership, attorned to his new landlords, and continued to occupy the acre of land and slaughterhouse by him erected thereon, until in May, 1892,—the expiration of the lease —when he abandoned the premises and the improvements he had put there for his use in slaughtering, and then brought this action against Oldham, the former owner, for the value of such improvements.

The cause was tried by the court without the aid of a jury; and from a judgment in plaintiff's favor in the sum of $185 defendant appealed.

The facts we have to deal with are practically undisputed, and we have detailed above such as are material. The point we have to decide is, whether or not the trial court properly construed the written agreement above quoted.

The learned judge who tried the case below seems to have regarded the written contract as imposing on Oldham the absolute duty of paying Chandler for his improvements if the land was sold regardless of the fact whether or not Chandler was disturbed in his leasehold. In other words, it was held that when Oldham, during the currency of the lease, conveyed the forty-acre pasture to Nichols & Bergman he (Oldham) then became bound absolutely to pay Chandler the value of his slaughterhouse improvements, even though Chandler's leasehold interest was reserved and left unimpaired in such sale of the freehold.

We cannot give our assent to this construction of the written contract. It hardly comports with what we deem a fair and reasonable interpretation of the face of of the instrument; and is so unreasonable and contrary to the circumstances and conduct of the parties in (the light of which the instrument ought to be viewed) that we feel constrained to deny it. The evident pur-

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port and meaning of the writing was that, for a consideration of $25 a year, Oldham rented to Chandler for a period of six years the land whereon said Chandler was to pursue his trade—the butcher business. Under this letting Chandler would have the right, during his tenancy or at the close thereof, to remove his trade fixtures and improvements, so long as their removal would not materially injure the freehold as it was when he took the lease. 2 Taylor's Landlord and Tenant section 544, *et seq.* [8 Ed.]; *Kuhlmann v. Meier*, 7 Mo. App. 260–263; *Bircher v. Parker*, 40 Mo. 118–120; s. c., 43 Mo. 443.

Chandler then had a lease on this acre of land with the right, during his tenancy, to remove the improvements placed thereon for the conduct of his trade. But it was thought that Oldham might sell the property during Chandler's tenancy and an innocent purchaser (unacquainted with the terms of the lease) might become entitled to these improvements. Hence the writing was made to stipulate that in "case of sale of said property Chandler is to have a fair valuation for any and all improvements made by him." The sale here provided for was a sale not only of the *freehold* but of the *leasehold*, such a sale as would deprive the tenant, as between him and Oldham's grantee, of the enjoyment of the lease. But no such sale was made. When Oldham conveyed to Nichols & Bergman he expressly reserved the interest of Chandler held under the lease. So that, indeed, Chandler lost nothing. Oldham advised him of the sale and of the reservation in his favor, and he, Chandler, expressed his satisfaction and thereafter recognized Nichols & Bergman as his landlord and paid them rent for the remainder of his term. Oldham, the landlord, in effect covenanted with Chandler, the tenant, to protect him in the enjoyment of the six years' term, and this the evidence

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unquestionably shows he complied with. The leasehold was not sold or disturbed in any way, and it would be the rankest injustice to permit Chandler to maintain this action.

The judgment, which was for the plaintiff, was clearly, in our opinion, for the wrong party and will be reversed. All concur.

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MICHAEL FOWLER, Appellant, v. ALONZO CARR *et al.*, Respondents.

**Kansas City Court of Appeals, November 20, 1893.**

**Replevin:** ANSWER: GENERAL DENIAL: RETURN OF PROPERTY. When in replevin the answer is merely a general denial, and the property has been turned over to the plaintiff, and the finding is for the defendant, the pleadings will not sustain a judgment ordering a return of the property, or a money judgment for its assessed value.

*Appeal from the Ray Circuit Court.*—HON. E. J. BROADUS, Judge.

REVERSED AND REMANDED.

*J. L. Farris & Son* and *Hardin Steel* for appellant.

In an action of replevin in the circuit court, where plaintiff has obtained the possession of the goods, the defendants must, in their answer, claim the same and demand a return thereof; otherwise the court cannot upon a finding in their favor, give judgment against the plaintiff for their value. Revised Statutes, 1889, sec. 7489; *Young v. Glasscock*, 79 Mo. 574.



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*Davis & Davis* for respondent.

Gill, J.—This is a replevin suit brought to recover a certain lot of corn, and which was turned over to plaintiff in the execution of the writ issued at the institution of the action.

The answer was merely a general denial. On a trial before the court, without a jury, the issues were found in defendant's favor, and the court entered a judgment for a return of the property to defendants, or for the value thereof fixed by the court at the sum of four hundred dollars. After unsuccessful motions for new trial, and in arrest, plaintiff brought the case here on appeal.

Under the state of the pleadings in this case the court was not warranted in awarding the judgment it did.

The statute provides: "If the plaintiff fail to prosecute his action with effect * * * and shall have the property in his possession *and the defendant in his answer claims the same and demands a return thereof,* the court or a jury may assess the value of the property taken and the damage for taking," etc. Revised Statutes, 1889, sec. 7489.

In the case at bar the defendants did not, in their answer, claim the property and demand a return thereof; they simply denied each and every allegation contained in the petition, nothing more. Hence under the statute, above quoted, defendants were not entitled to a judgment for a return of the property or to a money judgment for its assessed value as was given by the lower court. *Young v. Glascock*, 79 Mo. 574.

The motion in arrest ought to have been sustained. Judgment reversed and cause remanded. All concur.

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N. B. Watson, Appellant, v. W. O. Barbee, Respondent.

**Kansas City Court of Appeals, November 20, 1893.**

**Justices' Courts:** AFFIDAVIT FOR APPEAL: JURISDICTION. Although an affidavit for an appeal from a justice's court fails to state whether the appeal was from the merits or matter of costs, it still confers jurisdiction on the circuit court and may be amended before the motion to dismiss is passed upon. Following *Welsh v. Railroad*,——Mo. App.—

*Appeal from the Ray Circuit Court.*—Hon. Elbridge J. Broadus, Judge.

Reversed and remanded.

*James L. Farris & Son* for appellant.

(1) No appeal allowed by the justice shall be dismissed for want of an affidavit or recognizance, or because the affidavit or recognizance made or given is defective or insufficient, if "the appellant, or some person for him, will, before the motion to dismiss is determined, file in the appellate court the affidavit required." Revised Statutes, 1889, sec. 6340. (2) In the case of *Spencer v. Beasley*, 48 Mo. App. 98, wherein a similar point was raised, going to the sufficiency of the affidavit. The court took occasion to remark: "Pending the motion to dismiss the appeal, the plaintiff might have, under section 6340 of the statutes, obviated the objection, by filing such an affidavit as was required by section 6330, but instead of taking that course, he elected to stand upon the affidavit as made." Which opinion of the court was approvingly

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cited in tho case of *Whitehead v. Cole & Rodgers*, 49 Mo. App. 429." In this case, however, the plaintiff (appellant herein) did, what this court said in the case of *Spencer v. Beasley*, *supra*, he might have done, to-wit, filed a sufficient affidavit under Revised Statutes, 1889, sec. 6330, and thus obviated the objection to the affidavit.

*J. E. Ball* for respondent.

Ellison, J.—This action was begun before a justice of the peace. Plaintiff lost the case in that court, and in appealing to the circuit court he filed an affidavit with the justice which omitted to state whether the appeal was from the merits or matter of costs. A motion was made by defendant in the circuit court to dismiss the appeal for such omission. Before the motion to dismiss was passed upon, plaintiff offered to file a perfect affidavit, but the motion was nevertheless sustained, and plaintiff comes here.

The trial court doubtless sustained such motion, notwithstanding plaintiff offered a perfected or amended affidavit on the authority of *Whitehead v. Cole*, 49 Mo. App. 426, wherein it was held that the circuit court acquired no jurisdiction of the subject-matter when the affidavit for appeal was defective in the particular complained of in this case. In the case of *Welch v. Railroad*, decided at this term, the position taken in the *Whitehead case* was disavowed. The judgment in this case will, therefore, be reversed and the cause remanded. All concur.

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ALLEN H. ARNOLD, Respondent, v. THE HARTFORD FIRE INSURANCE COMPANY, Appellant.

**Kansas City Court of Appeals, November 20, 1893.**

1. **Insurance:** PROOFS OF LOSS: WAIVER: EVIDENCE: INSTRUCTIONS. Though proofs of loss are not as full and complete as required by the conditions of the policy, yet if they are timely received and objections are withheld until after time of making proofs and after negotiations for compromise, such objections are waived, and the proofs are admissible in evidence. An instruction on the point set out in the opinion is approved.

2. ———: EVIDENCE: DECLARATIONS OF AGENT: RES GESTÆ: HARMLESS ERROR.. The declarations of an agent who issued the policy and gave notice of the loss made *dum fervet opus* in the course of his employment, are admissible in evidence; and in this case, if improperly admitted, were merely cumulative and harmless.

3. ———: WAIVER, JURY QUESTION. Waiver of proofs of loss is a jury question, and the appellate court is concluded by its finding, if there is any evidence to sustain it.

4. **Instruction:** ABSTRACTIONS: COVERING CASE. Instructions which are mere abstractions, and do not cover the whole case, are properly refused.

*Appeal from the Boone Circuit Court.*—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

*Fyke & Hamilton* for appellant.

(1) The court erred in admitting in evidence second proofs of loss, dated July 27. The verified plans and specifications called for in the letter of July 20, are not furnished with this proof of loss. No such

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description of the building is given as would enable defendant to let a contract for repairing or replacing the same; and to comply with the requirements of the policy, such plans and specifications should be furnished as would enable defendant to let a contract for replacing the building. (2) The court erred in admitting in evidence statements made by Early, the agent who issued the policy, after the fire. It was not shown that Early had any authority whatever to speak or act for defendant in the adjustment of the loss. Until his authority was shown, his statements were incompetent. *Williams v. Edwards*, 94 Mo. 447-451; *Knudson v. Ins. Co.*, 43 N. W. Rep. 954. (3) The declaration of law given on the part of plaintiff is erroneous. There was no evidence that Early had authority to do or say anything to waive proofs of loss; on the contrary, the evidence clearly shows that he had no such authority. This instruction is inconsistent with instructions 1 and 2 given on the part of defendant. (4) Defendant's third declaration of law should have been given; whether or not the statement contained in second proofs of loss could be considered verified plans and and specifications is a question of law, not a question of fact. The court, upon examination thereof, can say whether it constitutes plans and specifications. No attempt was made to prove compliance with the requirements of policy as to furnishing plans. The term plans and specifications have a well understood meaning. Plan: "The delineation or design of a city, a house or houses, a garden, a vessel, etc., traced on paper or other substance representing the position and the relative proportions of the different parts." 2 Bouvier [14 Ed.], p. 333. Specification: "A particular and detailed account of a thing." 2 Bouvier [14 Ed.], p. 539. "A written statement containing a minute description or enumeration of particulars." Webster.

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*W. Gordon* and *C. B. Sebastian* for respondent.

(1) The trial court did not err in admitting in evidence the declarations of S. W. Early, the agent who issued the policy, who gave the notice of loss, and who was the only representative of the company plaintiff could see or hear from. The presumption is that he was acting in the scope of his authority, and the declarations were admissible. *Park v. Ins. Co.*, 26 Mo. App. 511; *Hamilton v. Ins. Co.*, 94 Mo. 353; *Anthony v. Ins. Co.*, 48 Mo. App. 65; *Barnard v. Ins. Co.*, 38 Mo. 106. (2) It would not constitute a reversible error. There are three separate grounds of waiver, each of which is fully sustained by the evidence. It was merely cumulative. *Young v. Hudson*, 99 Mo. 102. The accepting and holding the proof of loss without objection, constitutes a waiver. *Loeb v. Ins. Co.*, *supra.* The declarations of S. W. Early, defendant's agent, who issued the policy; the keeping of the proof of loss without objection, and endeavoring to secure a compromise and authorize Scott to make it, constituted a waiver. *Stavinow v. Ins. Co.*, 43 Mo. App. 513; *Cromwell v. Ins. Co.*, 47 Mo. App. 109. (3) There was no error in plaintiff's declaration; it correctly declared the law of waiver, and is not in conflict with the law given for defendant. (4) As to whether there was a waiver or not, was a question of fact to be determined by the court, sitting as a jury. *Loeb v. Ins. Co.*, 99 Mo. 50; *Gale v. Ins. Co.*, 33 Mo. App. 664; *Okey v. Ins. Co.*, 29 Mo. App. 105. It is manifest that the court, sitting as a jury, found that there was a waiver. There was substantial evidence to sustain the finding on all three grounds. This court will not set aside a finding of the trial judge when there is substantial evidence to sustain it. *Nelson v. Nelson*, 41 Mo. App. 130; *Ewing v. Phillips*, 35 Mo. App. 144.

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(5) There is no merit in the appeal. The entire record shows that the judgment was manifestly for the right party, and it should not be disturbed even if error did intervene. *Brooking v. Shinn*, 25 Mo. App. 277; *Clark v. Waldron*, 39 Mo. App. 21.

Smith, P. J.—This is an action on an insurance policy to recover damages by fire to building insured. The plaintiff owned a double brick building, the north part of which was covered by the policy sued on, and the south part by a policy in another company.

The policy provides that "if fire occurs the assured shall, within sixty days, render a statement to the company under oath, stating, among other things, all other insurance, whether valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies, * * * and shall furnish, if required, verified plans and specifications of any building destroyed or damaged." It also provides that no suit for the recovery of any claim shall be sustainable in any court until after full compliance by the insured with all the foregoing requirements. The policy also provides: "It shall be optional, however, with this company to * * * repair, build or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do."

A fire occured on June 3, 1892, which burned both buildings, including the party wall. On July 11, 1892, plaintiff caused proof of loss to be forwarded to defendant, which was received by defendant July 18, and on July 20 the proofs of loss were returned to plaintiff, and the following specific objections made thereto: "The proofs treat the damage to two buildings combined, each of which appears to be separately insured

in different companies, while the loss and damage to either is entirely irrelevant to the other company not covering the same, and on the building insured the loss must be specifically and separately stated. This company waiving none of its rights under the contract of insurance, demands full compliance with the conditions of the policy, which are clearly defined in lines from sixty-seven to eighty in its contract held by Mr. Arnold, and, on receipt of his sworn statement indicating his "knowledge and belief as to the time and origin of the fire, * * * together with verified plans and specifications of the construction of the building insured, his case will receive our prompt attention."

On July 27, 1892, plaintiff, in response to the above objections, made out and forwarded a second proof of loss, in which was set forth, *first*, an accurate description of the property covered by the policy sued on; *second*, the destruction of the building by fire and the cause of the fire as nearly as the assured was able to state; *third*, his interest in the property; *fourth*, the cash value of the building before the fire; *fifth*, by whom and for what purpose it was occupied and used at the time of the fire, and, *sixth*, that its walls were thirteen inches thick and about twenty-two feet high, in a 22x44-foot building. "Joists were 2x12 in lower ceiling and floors, and 2x10 in upper ceiling, all oak, two coats of plastering on the whole inside, except lower ceiling, which is ceiled with best ceiling; all walls and lower ceiling were papered; partition walls upstairs across the room, making two apartments. This partition wall without studding and papered on each side, with a partition door. The stairway which led from the upper to the lower corner of the building was removed from its original place, on the inside of said building, to the rear end of the same, and was a

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plain stairway made of hard pine. The floor was of the best yellow pine. The sheeting was the same as the ceiling; the roof, of Worcester tin, with two coats of mineral paint. There were three doors below and three above. There were six windows in the building, two below and four above; two good counters, and the lower room was wainscoted for four feet above the floor, all painted, oiled and varnished." It was also stated that the loss of the building was complete, except some salvage on brick.

This proof, it was admitted, was timely received by defendant. It does not appear that the defendant made any further objection to the proof of loss, though the defendant's adjuster testified that he mailed objections thereto to plaintiff, which plaintiff testified was never received by him or anyone for him. At the trial this proof was admitted in evidence over the objection of defendant.

After the second proof of loss was forwarded by Mr. Quinn, who made out and forwarded the same for plaintiff, he had a conversation with W. S. Early, the agent from whom plaintiff procured the policy in defendant company, and who was still the local agent of defendant at Centralia, in which conversation it was stated by Early that there would be no trouble about the insurance, but he said there was some little irregularity in the policy, but he said the principal was from the home company. They claimed, I believe, that the policy did not cover the annex, or that it did not cover the new part, and, if they could discount *pro rata* on that, it would settle it. He said with the Hartford company there is no trouble whatever, she would pay up all right. This statement of Mr. Early was communicated to the plaintiff.

The judgment was for plaintiff, and defendant appealed.

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I. It is objected that the trial court erred in admitting in evidence the second proof of loss because no such description of the building was given as would enable defendant to let a contract for repairing or replacing the same, and that this requirement of the policy was that plans and specifications should be furnished defendant. Doubtless the object of this provision of the policy was to afford the defendant such information in respect to the building destroyed as would enable it to protect itself against fraud and to intelligently exercise its option to either, pay the amount of the risk or replace the building. It may be well doubted whether the information imparted by the proof of loss is sufficiently comprehensive and specific for that purpose. It may have been for a building of that kind; but, however this may be, the defendant, having received and retained the proof of loss without objection, and endeavoring to obtain a compromise until the expiration of the sixty days after the firè in which plaintiff had a right under the policy to amend his proof so as to meet any objection suggested thereto by defendant, must be held to have accepted the detailed description as set forth in the proof as sufficiently meeting the requirement of the policy in respect to plans and specifications of the building. Whatever the defect of the proof may have been, the defendant, under the circumstances, must be held to have waived its objection thereto. If the defendant was not satisfied with the proof of loss made, common fairness required that it should have timely made the fact known to the plaintiff, *Loeb v. Ins. Co.*, 99 Mo. 50; *Stavinow v. Ins. Co.*, 43 Mo. App. 513; *Cromwell v. Ins. Co.*, 47 Mo. App. 109.

II. The defendant further complains of the action of the trial court in admitting in evidence the declaration of Early, the agent who issued the policy and

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gave notice of the loss. The authority of an agent may be inferred from the nature of his employment. The declarations in question were made *dum fervet opus*, in the course of his employment. They were part of the *res gestæ*. *Harrison v. Railroad*, 50 Mo. App. 332; *Edwards v. Thomas*, 66 Mo. 468; *Midland Lumber Co. v. Kreeger*, 52 Mo. App. 419. At most they only tended to establish the waiver of proof of loss, and since there was other independent evidence quite sufficient to warrant the submission of the question of waiver, they were only cumulative, and if improperly admitted, they did no harm.

III. As to whether there was a waiver or not, was a question of fact to be determined by the court sitting as a jury. *Loeb v. Ins. Co.*, *supra*; *Gale v. Ins. Co.*, 33 Mo. App. 664; *O'Key v. Ins. Co.*, 29 Mo. App. 105. And since there was substantial evidence adduced to sustain the finding of the trial court, it is conclusive on us. *Swayze v. Bride*, 34 Mo. App. 414; *Smith v. Zimmerman*, 51 Mo. App. 519.

IV. The trial court, we think, committed no error in declaring the law as requested by plaintiff, to the effect that, if the proofs of loss were not as full and complete as required by the conditions of the policy, yet, if the defendant received the proofs within sixty days after the date of the fire and kept the same without notifying the plaintiff of any objection thereto, but he was informed by the agent of defendant who issued the policy, prior to the expiration of the sixty days after the fire occurred, that the plaintiff's claim was all right and would be paid, then defendant waived further proof of loss. There was evidence upon which to base the theory of this instruction, and there is no objection perceived to its correctness as a legal proposition.

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V. It follows as an inevitable sequence that the court did not err in refusing to declare the law to be that the statement of the size, dimensions and materials of the building contained in the proof of loss did not constitute the verified plans and specifications required by the policy. It was a mere abstraction. It did not cover the whole case. It left out of consideration the evidence of the waiver of the requirements in the policy to which it refers. The other declarations for the defendant covered very fully the grounds upon which defendant rested its defense under the pleadings and evidence, so that the refused declaration was in any view superfluous.

The judgment is for the right party and must be affirmed. All concur.

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## DAVID A. MAYER, Appellant, v. J. F. KEITH *et al.*, Respondents. 55 157 / 62 622

**Kansas City Court of Appeals, November 20, 1893.**

1. **Chattel Mortgage:** DESCRIPTION: GROWING CROP. A description in a chattel mortgage, calling for seventy acres of growing corn, raised by the mortgagor, on his farm in section 35, will not cover corn raised by him on an adjoining rented farm in the same section; nor is parol evidence admissible to show the mortgagor intended to include the corn on the rented place.

2. ———: ———: INQUIRY. Such description is not of that grade of sufficiency as to enable third parties, after reasonable inquiry suggested by the instrument, to identify the corn on the rented farm as intended to be covered.

3. ———: ———: GROWING CORN: COUNTY. A description in chattel mortgage calling for forty acres of corn, standing and grown on a certain subdivision of section 35, etc., is sufficient, though it is not stated that the land is in the county, yet the mortgagor is described as being of a certain county, and, as having the corn in his possession.

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*Appeal from the Boone Circuit Court.*—HON. JNO. A. HOCKADAY, Judge.

AFFIRMED.

*Thos. S. Carter* and *C. B. Sebastian* for appellant.

(1) Defendant's mortgage was inadmissible, *first*, because the *locus* of the property does not appear from the mortgage itself. There is nothing in the mortgage to show that the corn is in the state of Missouri, much less on what farm, or for what year raised, or even that it was in Boone county, Missouri. *Bozeman v. Fields*, 44 Mo. App. 432, and authorities cited in respondent's brief; *second*, because of its uncertainty, for how could forty acres of corn stand and grow on one hundred and twenty acres of land as described in defendant's mortgage? Nor does the mortgage state it was all the corn standing and grown on said one hundred and twenty acres. *Bank v. Metcalf*, 29 Mo. App. 384, and authorities cited by appellants. (2) The trial court committed error in permitting witnesses J F. Keith and Eliza J. McCallister, over objection of plaintiff, to testify in what county and state the corn in question was located, as they were thereby adding to the mortgage terms not contained therein. *Chandler v. West*, 37 Mo. App. 631. (3) The court erred in refusing to allow witness, Grover E. McCallister, to testify that the corn in question was the identical corn he intended to include in the mortgage to plaintiff, on objection of defendant. *State v. Cabanne*, 14 Mo. App. 455; *Bender v. Markle*, 37 Mo. App. 234; *Campbell v. Allen*, 38 Mo. App. 27; *Cobb v. Day*, 106 Mo. 278. (4) Instruction number 2, offered by plaintiff, should have been given. Plaintiff's mortgage was recorded long prior to defendant's and was such that a

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third person by its aid, together with the aid of such inquiries as it suggested, could have identified the property conveyed. It tells by whom the corn was raised, for what year raised, the farm raised on, giving the section, township, range, county and state where located, and stating it was all the corn raised by the mortgagee for that year, except ten acres, which was separated from that mortgaged. *Stonebraker v. Ford*, 81 Mo. 532. And the *locus* of the property thus fully and clearly appearing from plaintiff's mortgage he could resort to parol proof for the purpose of further identification. *Bozeman v. Fields, supra.*

*Sam. C. Major* for respondent.

(1) Notwithstanding that the description in a chattel mortgage is faulty, in that it does not locate the property and does not state who is the owner, yet such fault is cured where other portions of the instrument show the residence of the mortgagor, and that the property is in his possession, and that it shall not be removed from the county in which the mortgagor's residence is fixed, and that, upon default, it shall be sold in such county. *Ester v. Springer*, 47 Mo. App. 99. (2) That the description in a chattel mortgage is sufficient, where it is such as enables third parties, aided by the inquiries which the instrument itself suggests, to identify the property, and oral testimony in aid of the description is admissible. *State v. Cabanne*, 14 Mo. App. 294, 455; *Bank v. Jennings*, 18 Mo. App. 651; *Campbell v. Allen*, 38 Mo. App. 27; *Jennings v. Sparkman*, 39 Mo. App. 663; *Boeger v. Langenberg*, 42 Mo. App. 7. (3) Under the rules of description as above set forth, appellant's mortgage was clearly inadmissible in evidence. It was sought by evidence to contradict this description and affix a different one. This cannot be done. The law is that, while parol

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evidence may aid an imperfect description, it cannot contradict the description, nor affix a different one to the mortgage. *Cattle Co. v. Bilby*, 37 Mo. App. 43.

Gill, J.—This is a contest between two mortgagees as to who was entitled, on November 10, 1892, to the possession of a lot of corn grown on the farm of Mrs. Eliza J. McCallister, in Boone county, Missouri. Plaintiff Mayer asserts a right by reason of a chattel mortgage made to him in September, 1892, by Grover E. McCallister to secure his individual debt of $624, and defendant Keith claims under a mortgage made to him in October, 1892, jointly by said Eliza J. and Grover E. McCallister to secure a joint debt of about $800, then owing by said Eliza J. and Grover E. McCallister to said Keith. The validity of both mortgages is drawn in question. The issues were tried before the circuit court without the aid of a jury, and the trial judge gave judgment in defendant's favor and plaintiff appealed.

In order to a full understanding of the matters in dispute, we deem it necessary to state, that Eliza J. McCallister (who is the widowed mother of Grover McCallister) owned and lived on a farm of about one hundred and twenty acres, while adjoining her, and in the same neighborhood, Grover E. McCallister had a separate farm on which, too, he resided. In the season of 1892, Grover McCallister raised a crop of corn on his own farm, and also cultivated on shares forty acres of corn on his mother's farm; and it is this last named corn, raised on the farm of Mrs. Eliza McCallister, which is the subject of this controvery.

I. With this preliminary statement we proceed to consider the two mortgages. Both are attacked because of alleged insufficient description. The Mayer mortgage, it must be borne in mind, was executed by Grover

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McCallister to secure an individual debt which he owed Mayer. It was prior in point of time to the Keith mortgage; and if, therefore, it covered the corn in question, the plaintiff in this action must prevail.

We now quote from the Mayer mortgage: "Know all men by these presents, that the undersigned Grover E. McCallister, of Boone county, Missouri, in consideration of the sum of six hundred and twenty-four dollars, to him paid by D. A. Mayer, of Boone county, Missouri, do sell, assign, transfer and set over unto the said D. A. Mayer, and to his executors, administrators and assigns, the following personal property, to-wit: That is to say, *seventy acres of growing corn raised by the said Grover E. McCallister for the year 1892, on his farm, in section 35, etc., in* Boone county, Missouri, *being all the corn he raised on said farm*, excepting ten acres on the west end of the farm, being separate and apart from the seventy acres above mentioned."

The lower court held that the description, "seventy acres of growing corn raised by the said Grover E. McCallister on *his farm* in section 35, * * * Boone county, Missouri, being all the corn he raised on said farm," etc., did not fairly include within its terms the corn which said Grover may have raised on shares on Mrs. Eliza McCallister's farm; and we concur in this opinion. It matters not that Grover McCallister, in his mind, may have *intended* to include not only the corn he raised on his own farm, but as well that he raised on another farm. It won't do in such cases to give effect to such concealed intentions. The mortgage on its face must give notice to third parties of such intentions, or else great fraud would be accomplished. As we had occasion once before to say, in a case similar to this in principle: "It is true that parol evidence may be called in to explain the circumstances and thereby fit the description, as given in the mortgage, to certain



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property intended to be mortgaged, but it is not permitted the mortgagee to show, as against an innocent purchaser, that his mortgage naming property of a certain description, covered or applied to property of a different description." *New Hampshire Cattle Co. v. Bilby*, 37 Mo. App. 43, and cases cited. A description of "all the corn raised in the year 1892 on Grover McCallister's farm, in Boone county, Missouri," cannot be held to cover corn raised the same year on another and different farm.

Neither was the description here of that grade of sufficiency as would enable third parties after reasonable inquiry suggested by the instrument to identify the corn in question as that intended to be covered by the mortgage, as was that in *Campbell v. Allen*, 38 Mo. App. 27, and like cases. By inquiry it would be found that Grover McCallister owned a farm, on which he lived, and that in that year he raised a crop of corn thereon; the mortgage then would be sufficient so give notice that this corn so raised on his farm, was covered by the mortgage, but it would not be sufficient to include other corn raised on another farm.

We have, then, no hesitancy in declaring, with the lower court, that the Mayer mortgage did not cover the corn in controversy. The plaintiff, therefore, had no title or right of possession.

II. As to the chattel mortgage under which defendant Keith claims, little need be said. The description in the mortgage is "forty acres of corn standing and grown on the west half of the southeast quarter of section 35, also the southeast of the northwest quarter of section 35, township 51, range 13." This was the description of the Eliza McCallister farm, and the evidence showed that on that farm there was but forty acres of corn raised that year. But it is objected that the description is faulty in not further stating that sec-

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tion 35, township 51, range 13, was in Boone county, Missouri. In a case lately decided by us, this objection as to the *situs* of the mortgaged property is fully answered. See *Estes v. Springer*, 47 Mo. App. 99. The mortgage description there was assailed for the same reason as in the case at bar. And we answer the objection as was done in that case; since the mortgage discloses that the mortgagors are of Boone county, Missouri, and since it is recited that the property was to remain in their possession until condition broken, and was not to be removed from Boone county, we hold that it was thereby made sufficiently apparent, as matter of description from the mortgage itself, that the property was in Boone county, Missouri.

The foregoing disposes of every material question in this controversy. Keith took a valid chattel mortgage as additional security for a *bona fide* claim he held against the two McCallisters. There is nothing whatever appearing in this record to justify any charge of fraud, either actual or constructive; and as we discover no substantial error in the trial of the cause, the judgment will be affirmed. All concur.

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J. D. Chorn, Respondent, v. The Missouri, Kansas & Texas Railroad Company, Appellant.

**Kansas City Court of Appeals, November 20, 1893.**

1. **Appellate Practice:** RAILROADS: KILLING STOCK: CIRCUMSTANTIAL EVIDENCE. If the triers of the facts can with reasonable certainty infer from the surrounding circumstances that the stock was killed in the manner charged, then the appellate court is not authorized to interfere.

2. ———: FINDING OF TRIAL COURT: DIFFERENT COUNTS. The appellate court will not interfere with the judgment below, on the ground that the trial court did not make a separate finding on each count, where the record fails to show affirmatively that the court did not pass on the merits of each count separately.

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*Appeal from the Howard Circuit Court.*—Hon. John A. Hockaday, Judge.

Affirmed.

*Jackson & Montgomery* for appellant.

(1) The court erred in refusing to give the peremptory instructions numbered 1, 2, 3 and 4, for the reason that the evidence did not show that the several animals got on the railroad ground at any particular places, nor that the fence was defective at any place where any of said animals entered the railroad ground. (2) The finding was void because there were four distinct causes of action set forth in four distinct counts of the petition, and yet the court made but one general and aggregate finding, when there should have been a separate finding on each count. The court refused to correct this error, although it was pointed out in the motion for new trial and in the motion in arrest. *Bricker v. Railroad*, 83 Mo. 391, and cases cited.

*Sam. C. Majors* for respondent.

(1) The evidence was that the tracks of the animals showed that they got onto the right of way where the fence of defendant was down. *Gee v. Railroad*, 80 Mo. 283; *Harned v. Railroad*, 51 Mo. App. 487; *Allen v. Railroad*, 38 Mo. App. 294; *Hamilton v. Boggess*, 63 Mo. 233; *Gaines v. Fender*, 82 Mo. 497; *Warren & Son v. Maloney*, 39 Mo. App. 295. And these authorities are a complete answer to points 1, 2, 3, 4 and 5. (2) The sixth point might be well taken if it were a fact that the court made but one general and aggregate finding; although there seems to be a conflict of authority on this point. The case of *Bricker v. Railroad*, 83 Mo. 391, sustains that view, while 17 Mo.

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App. 341, in the case of *Loomis v. Railroad*, holds a contrary view. But like the case of *Dodds v. Estill*, 32 Mo. App. 46, it is not necessary in this case that you should choose between the two opinions on this rule of practice. The truth is, that the court did in fact find upon all the counts for the amount claimed in each, and upon each count separately. An examination of the statement of plaintiff's cause of action, filed with the justice, shows this beyond a doubt. How can appellant say that the court did not find upon each count? What evidence have they for this contention? The court sitting as a jury in the trial of a cause does not return a written verdict, and there is no separate record made of its finding. Every presumption attends the acts and doings of a court of general jurisdiction, and a party who asserts that error has been committed must prove it. *State v. Burns*, 85 Mo. 47; *Porth v. Gilbert*, 85 Mo. 125; *Beckley v. Skroh*, 19 Mo. App. 75.

Gill, J.—This is an action originally brought before a justice of the peace under the double damage act, to recover for the killing of plaintiff's stock; the statement filed with the justice charged, *first*, the killing of two hogs of the value of $6 each, on March 3, 1892; *second*, the killing of one Cotswold sheep, of the value of $8, May 30, 1892; *third*, the killing of two common Cotswold ewes, of the value of $3 each, June 1, 1892; *fourth*, the killing of one hog of the value of $8, July 11, 1892—aggregating in value $34.

The imputed act of negligence, was the failure of defendant to construct and maintain lawful fences at the different places where said animals went upon the railroad, and where it was the duty of defendant to fence its right of way. The case was taken by appeal to the Howard circuit court, where on a trial before

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the court without a jury, plaintiff had judgment for $68, being double the aggregate damages suffered by him, and defendant appealed.

I. The judgment herein is assailed on two grounds. The first five paragraphs of defendant's brief all relate to an alleged failure of proof to establish a case against the defendant. In this connection we have read the evidence as shown by the abstract and find therein abundant testimony to sustain the court's finding on every count of the complaint. There was ample evidence justifying the court in finding, that defendant was derelict in its duty to maintain lawful fences along its right of way; that by reason thereof plaintiff's stock (of the kind and at the times named in the complaint) escaped from plaintiff's adjoining enclosures onto the railroad and was there run over and killed by passing trains. Whilst there were no eyewitnesses to the killing, yet there is abundant indirect proof that the stock was killed in the manner charged in the petition. The rule is well understood that if the triers of the facts can with reasonable certainty infer from surrounding circumstances that the stock was killed in the manner charged, then this court will not be authorized to interfere. *Harned v. Railroad*, 51 Mo. App. 487.

II. The next and only remaining objection is, that though there were four distinct and separate causes of action out set out in the complaint, yet the trial judge did not make a separate finding on each count as there should have been. The law is settled in this state, as claimed by defendant's counsel, that where there are two or more counts in the petition there should be a separate finding on each, and that it is error for the trial court to receive from the jury a general verdict in the aggregate on all counts. *Bricker v. Railroad*, 83 Mo. 391. Admitting, now, that this same rule should apply where the issues of fact, as well as law, are tried

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before the judge without a jury, how are we to determine in this case that the court did not make a separate finding on each count? There is nothing on the face of these proceedings that would so indicate. There was no verdict nor separate finding of facts by the court and the judgment, wherein the aggregate damages are named with the order doubling the same as the statute requires, fails to show that the court considered the different counts *in solido* rather than separately. But when the face of the complaint is considered along with the evidence and the judgment, it would seem conclusive that the trial court passed on each count separately and found thereon for the plaintiff. This is manifest from the following considerations appearing on this record: *first*, that in the first count $12 is claimed, in the second $8, in the third $6, in the fourth, $8; and *second* from the further fact that the evidence was undisputed that the animals killed were of the values named in the complaint; and *thirdly*, because in the judgment the aggregate amount of damages is fixed at $34, which was the exact aggregate sum claimed in the petition and supported by all the evidence in the case.

However, we base our decision on this point, and hold it against the defendant, on the ground that the record fails to show affirmatively that the court who tried the case did not pass on the merits of each count separately. As often said: "Every presumption attends the acts and doings of a court of general jurisdiction, and a party who asserts that an error has been committed must prove it." *State v. Burns*, 85 Mo. 47.

Judgment affirmed. All concur.

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## B. Hellman & Co., Appellants, v. John Bick, Garnishee, etc., Respondent.

55 168 59 590 **Kansas City Court of Appeals, November 20, 1893.**

1. **Fraudulent Conveyances:** CREDITOR SECURING HIS DEBT. Where a creditor of an insolvent firm, without knowledge of any fraud, and only endeavoring to secure payment of his own claim, takes no more goods than is necessary, he is not answerable as garnishee of the firm at the suit of another creditor.

2. **Evidence:** TRIAL BEFORE COURT. The same rigid rules in regard to the admission and exclusion of evidence ought not to be enforced in a trial before the court, as before a jury, for it is not to be presumed that the court would, in its deliberation and judgment, be influenced by evidence that probably might probably mislead a jury.

*Appeal from the Audrain Circuit Court.*—Hon. E. M. Hughes, Judge.

Affirmed.

*John M. Barker* for appellant.

(1) In this case the partnership had ceased under a written contract to honestly settle the debts, and J. B. Harper's pretended sale of all the goods to John Bick was void. *Clayton v. Hardy*, 27 Mo. 536. (2) The transfer of the goods that night was fraudulent. If the intention of such a transfer is to defeat other creditors the deed as to them is fraudulent. *Henderson et al. v. Henderson*, 55 Mo. pp. 534, 555, 556, and cases cited. (3) While it is unquestionably true that a debtor may, in failing circumstances, prefer one creditor to the exclusion of another, that doctrine cannot be applied to this case because J. B. Harper had no right to prefer a creditor; he could only act under his contract to treat creditors fairly, and his departure from that contract

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was simple rascality. The two brothers, as partners, had already preferred creditors in writing and in an upright and honorable way, and J. B. Harper should not be allowed to conspire with Bick to swindle the others. (4) The gross inadequacy of price in this case, taken with the other circumstances, establishes fraud on the part of Bick and J. B. Harper. *Ames v. Gilmore*, 59 Mo. 537.

*W. W. Fry* for respondent.

(1) The case was tried before the court and the appellate court will not review the evidence or interfere with the finding of facts. *Pierson v. Slifer*, 52 Mo. App. 273; *Orr v. Rode*, 101 Mo. 399; *McCullough v. Ins. Co.*, 21 S. W. Rep. 207–209. (2) A fraudulent conveyance will not be set aside at the instance of creditors to the prejudice of a *bona fide* purchase from a fraudulent grantee. *Gordon v. Ritenour*, 87 Mo. 54. If the transfer by J. B. Harper was fraudulent on his part there was not an item of evidence that respondent had any knowledge of it. That this was the finding of the trial court is apparent from the instruction given by the court for appellant. (3) If J. W. and J. B. Harper were partners at the time of the sale to respondent (by the evidence J. B. Harper was the sole owner) one partner had the right to sell partnership property to pay the debts of the firm. The property was under attachment, and it was properly sold to pay the debts. *Clark v. Rives*, 33 Mo. 579; *Keck v. Fisher*, 58 Mo. 532; *Holt v. Simmons*, 16 Mo. App. 114.

Ellison, J.—Plaintiffs obtained judgment against defendants and had garnishment served on Bick, the respondent here, who denied owing defendants or having any of their property. The circuit court, on trial without a jury, found for Bick, and plaintiffs appealed.

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There is nothing more in this case than a sale of personal property to Bick, one of the creditors of an insolvent firm having no knowledge of any fraud and only endeavoring to secure or obtain payment of his own claim, and taking no more goods than was necessary. The court found for Bick and there was testimony in the cause to support the finding. In such case we will not disturb the result, as has been so frequently stated.

It seems that defendants were partners in a small stock of drugs and groceries. That they bought their stock of drugs from Bick, paying him part cash and giving their note for $320. The groceries were purchased of grocery wholesale houses. Defendants concluded to separate and agreed between themselves that the defendant, J. B. Harper, should take the stock and assume the partnership debts. About the time the invoice was completed, a firm of the grocery creditors attached the property for their claim of $48. Bick, learning of this, set about to collect his note of $320, which resulted in his purchasing the stock from J. B. Harper for the amount of the attachment just referred to and his note of $320. He paid off the attachment, gave up his note and took possession of the goods. There was evidence tending to show that the goods were not worth more than the amount he paid for them, and there was no evidence tending to show that he was in any way knowingly connected with any fraud. In such case the sale is valid. See *Meyberg v. Jacobs*, 40 Mo. App. 128; *Tennent v. Rudy*, 53 Mo. App. 196; *State ex rel. v. Durant*, 53 Mo. App. 493.

Some objection was made as to the admission of testimony which we think is not of sufficient substance to affect the result, especially when it is considered that the case was heard by the court without a jury. Judge Burgess, speaking for the supreme court in *McCullough*

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*v. Ins. Co.*, in an opinion promulgated January 31, 1893, and not yet reported, says that when a cause is submitted to the court without a jury "the same rigid rules in regard to the admission and exclusion of evidence ought not to be enforced as if the case had been tried before a jury, for it is not to be presumed that the court would, in its deliberation and judgment, be influenced by evidence" that might probably mislead a jury.

The judgment will be affirmed. All concur.

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A. W. BAKER, Appellant, v. W. P. ROBINSON *et al.*, Respondents.

**Kansas City Court of Appeals, November 20, 1893.**

**Partnership:** SALE OF PARTNER'S INTEREST: ACTION AT LAW. A partner may sell to his copartners his interest in the partnership and recover the purchase price in an action at law, and this too, whether such interest is incumbered or unincumbered by the condition of the partnership or whether its amount is fixed or the price thereof agreed upon.

*Appeal from the Chariton Circuit Court.*—HON. O. F. SMITH, Special Judge.

REVERSED AND REMANDED.

*A. W. Johnson* and *Crawley & Son* for appellant.

(1) A sale by one partner to his copartners of his entire interest in the assets and business of the firm, works *ipso facto* a dissolution of the partnership. *Spaunhaust v. Link*, 46 Mo. 197; *Allen v. Logan*, 96 Mo. 591. (2) Previous to such dissolution the present demand had no existence. It is not a demand arising out of a partnership transaction, nor would an accounting or settlement of the partnership affairs embrace it, or affect it in any way. In such cases the authorities

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uniformly hold that the rule forbidding one partner to sue his copartner at law, has no application. *Ham v. Hill*, 29 Mo. 275; *Whitehill v. Shickle*, 43 Mo. 537; *Burress v. Blair*, 61 Mo. 133; *Powers v. Braley*, 41 Mo. App. 556; *Kinney v. Robison*, 52 Mich. 589; *Mitchell v. Wells*, 54 Mich. 127; *Pardee v. Markle*, 111 Pa. St. 548; *Fay v. Finley*, 14 Phila. (Pa.) 206; *Wells v. Carpenter*, 65 Ill. 447; *Merriwether v. Hardeman*, 51 Tex. 436.

*C. Hammond & Son* for respondents.

(1) In Missouri the rule has been strictly adhered to, that, when there has been no settlement of accounts and no balance ascertained, one partner cannot maintain *assumpsit* against another. These principles of law relating to partnerships are elementary and have been reiterated in an unbroken line of decisions in all the states. In Missouri, especially, the courts have steadily adhered to the rule here announced. *Stothert v. Knox*, 5 Mo. 112; *Springer v. Cabell*, 10 Mo. 640; *McKnight v. McCutchen*, 27 Mo. 436; *Russell v. Grimes*, 46 Mo. 413; *Scott, Adm'r, v. Caruth*, 50 Mo. 120. (2) The pretended sale in this case was at most but an effort to come to a settlement, ascertain the value of plaintiff's interest and "strike a balance," but it never was done, by plaintiff's own admission, and the court very properly sustained defendants' demurrer to the evidence.

Ellison, J.—Plaintiff seeks by this action at law to recover of defendants the purchase price of his interest as one of the partners in a firm known and styled the "State Planing Mill Company." At the close of the evidence for plaintiff, the court sustained a demurrer thereto. Plaintiff took a nonsuit with

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leave; and the court refusing to set it aside, he brings the case here.

The contention on the part of the defendants is that, since plaintiff and the defendants were partners, and there has been no settlement of the partnership affairs, no action at law will lie between the partners. We have not so much fault to find with the different propositions of the law of partnership which is advanced to us by defendants as we have with the attempt to apply these propositions to facts which the evidence tended to establish. There was evidence tending to prove that plaintiff and defendants entered into a partnership; that plaintiff put into the partnership fund two lots, which he valued at $200, and $425 in money; that one of the defendants put in a sum of money and another of them another sum, while the two others put in little or nothing aside from labor. After the partnership had been running for some considerable period of time, plaintiff concluded he would sell out his interest and withdraw from the firm. He made known his intentions to the other partners (these defendants) and proposed to sell to them. Plaintiff testified that: "I told them what I would take for my interest; that was what I put in; lots valued at $200, cash $425, making $625, and reasonable wages for my labor. That was my proposition, and they accepted it." That, thereupon, plaintiff retired from the firm and defendants remained in possession of the property and prosecution of the business for themselves—not considering or recognizing plaintiff any further. That they, shortly after the purchase, published the following notice in the *Salisbury Press-Spectator:*

"NOTICE OF RETIRING.

"Notice is hereby given to all that Mr. A. W. Baker is no longer connected with the Star Planing

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Mill Co., of Salisbury, Mo., having sold his entire interest to the company. All outstanding accounts will be paid by the company and all debts must be paid to it.

"STAR PLANING MILL CO.

"Sept. 21st, 1892."

If these matters are facts which can be established (and we must take them as established on the case as presented here), plaintiff ought, unquestionably, to recover the value of his lots, as agreed, and the $425 cash as well as such sum as can be shown to be the reasonable value of his services. One partner may sell to his copartners his interest in the partnership and recover the purchase price in an action at law. It makes no difference whether that interest be great or small—whether it be incumbered by declining trade, partnership debts and unsettled accounts, or whether it be a flourishing business established on a wide and well-earned reputation and earning large profits. This is the sum and substance of plaintiff's contention and it should have prevailed.

The fact that the value of his labor was not named; or, indeed, if the value of the lots was not fixed upon, will not hinder plaintiff's action. There is no legal hindrance to one selling and delivering his property to another at a price to be thereafter fixed.

As before intimated, we are not unmindful of the propositions of law and equity as to the adjustment and settlement of partnership affairs, and of the right of action which does or does not lie between partners; but those considerations do not arise in this case so far as we are now at liberty to consider it. This case as made by plaintiff in no way involves or concerns the partnership accounts, and does not in any manner require an inquiry as to them.

The judgment will be reversed and the cause remanded. All concur.

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HENRY HARMAN, Appellant, v. CITY OF ST. LOUIS *et al.*, Respondents. 55 175 / 55 257

**St. Louis Court of Appeals, November 21, 1893.**

**Appellate Jurisdiction:** ACTION TO WHICH THE CITY OF ST. LOUIS IS A PARTY. The city of St. Louis is a political subdivision of this state, and the supreme court, therefore, has exclusive jurisdiction of an appeal in a cause wherein it is a substantial, though not the sole, party.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

TRANSFERRED TO SUPREME COURT.

*Henry M. Post* for appellant.

*Wm. C. Marshall* and *J. P. Vastine* for respondents.

ROMBAUER, P. J.—The plaintiff brought this action to recover from the city of St. Louis and the other defendants damages caused to him by the erection and continuance of certain frame buildings in the vicinity of his property in violation of the city ordinances. The defendants all demurred to the petition. The demurrers were sustained, and, the plaintiff declining to plead further, judgment was entered on the demurrer against him. From this judgment the plaintiff appeals to this court.

The city of St. Louis is a political subdivision of the state, and the supreme court has exclusive appellate jurisdiction of any cause wherein a political subdivision of the state is *a party*. Such exclusive appellate jurisdiction does not depend on the political subdivis-

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ion being a *sole* party plaintiff of defendant, but upon its being a party. We have so decided in *Freeman v. St. Louis Quarry Co.*, 30 Mo. App. 362, and transferred that cause to the supreme court on the ground that the city *was a substantial party* therein. That cause has never been remanded to this court, and we must conclude that the supreme court, by retaining jurisdiction of it, approved of our ruling.

It will thus appear that the supreme court has jurisdiction of this appeal, and that the appeal herein has been improvidently granted to this court.

Ordered that the cause be transferred to the supreme curt, and that the clerk do at once transmit the record in this cause with a copy of this order of transfer to the clerk of that court. All concur.

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55 176 / 61 456 MICHAEL KINEALY, Appellant, v. PATRICK M. STAED *et al.*

St. Louis Court of Appeals, November 21, 1893.

1. **Injunction**: PRELIMINARY RESTRAINING ORDER: EXACTION OF NON-STATUTORY BOND. A temporary injunction was granted on condition that the plaintiff should give bond in statutory form, and, furthermore, execute a bond of indemnity to the party enjoined as trustee for persons who were not parties, but whose interests were affected, and both bonds were given. Subsequently the injunction was dissolved, and the plaintiff moved for the cancellation of the non-statutory bond. *Held*, that this motion was without merit.

2. ———: JURISDICTION OF CIRCUIT COURTS: INTERFERENCE WITH PROCESS OF SUPREME COURT. *Held*, BOND, J., expressing no opinion, that a circuit court has no power to interfere with process of the supreme court, and that it has, therefore, no jurisdiction to restrain the levy of an execution issued by that court, where the execution creditor is insolvent, and the execution debtor holds an unpaid judgment against him for more than the amount of the execution.

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3. ———: ENFORCEMENT OF DORMANT JUDGMENT: STATUS IN EQUITY OF HOLDER OF SUCH JUDGMENT. *Held*, by BOND, J., that a judgment which has lain dormant for more than ten years does not entitle its owner to any relief in equity beyond that of a general creditor of the judgment-defendant, and, accordingly, that it is not a proper basis for an injunction against the enforcement of another judgment obtained by such defendant against such owner.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*Ford Smith* for appellant.

(1) The motion to vacate so much of the order granting the temporary injunction as required plaintiff to give bond to the sheriff as trustee, and to cancel said bond, should have been sustained. It imposed upon plaintiff conditions not imposed by statute, and not warranted by law. It compelled plaintiff to submit to an illegal requirement or lose his legal rights. *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6, 9, 10. (2) Plaintiff's judgment against Patrick Macklin is a valid subsisting claim—a debt—even if no execution could issue on it. Equity will restrain an insolvent debtor from enforcing a judgment against a creditor, and compel him to set off the account against his judgment. *Payne v. London*, 1 Bibb, 518; *Marshall v. Cooper*, 43 Md. 46; *Baker v. Ryan*, 67 Iowa, 708. It will do so, even when the claim of the complainant in the bill to enjoin the execution of the judgment is an open account. *Levy v. Steinbach*, 43 Md. 212; *Lindsay v. Jackson*, 2 Paige, 581; *Boone v. Small*, 3 Cranch C. C. Rep. 628.

*John B. Dempsey* for respondents.

Plaintiff's petition cannot be maintained under the decision of the supreme court in *Mullen v. Hewitt*, 103 Mo. 639.



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ROMBAUER, P. J.—The plaintiff's petition states in substance the following facts. In December, 1873, one Ferguson recovered a judgment against the defendant, Patrick Macklin, for $626. This judgment, by successive assignments, became the property of plaintiff in 1877. The plaintiff has ever since been the owner thereof; it is wholly unpaid, except fifty dollars thereof, and now amounts, with interest, to seventeen hundred dollars and more.

In March, 1886, Patrick Macklin and Ann, his wife, and the defendant, Haydel, as trustee for such wife *recovered in the supreme court of Missouri* a judgment for costs against the plaintiff, the entire judgment being for $750 or less. Of this judgment $480 were for costs laid out by Patrick Macklin, and the defendant Haydel had no substantial interest in any of them. Ann Macklin died in the year 1886, and no administration was ever taken out on her estate. Patrick Macklin has been wholly insolvent ever since 1875.

The petition then proceeds to state that the Ferguson judgment, owned by plaintiff, far exceeds in amount the claim of defendant Macklin for costs in the execution awarded to him and others *by the supreme court*; that, after said execution was issued, the plaintiff presented his petition to the supreme court to quash or recall the same; that the supreme court overruled this petition, and on March 23, 1891, ordered an execution to issue to the defendant, Staed, who is sheriff of the city of St. Louis, who took no action thereon until the twenty-third of March, 1891; that the defendant, Staed, at the instance of the defendant, Macklin, threatened to levy said execution on property of the plaintiff; that the plaintiff is willing to pay all costs in said execution belonging to other persons than said Macklin into court, as soon as their amounts are ascertained; that, if the plaintiff should be compelled to pay

said execution, the said Ferguson judgment now owned by him would be wholly lost to him owing to the insolvency of said Macklin, and that he has no remedy except in equity.

"Wherefore plaintiff prays that an account be taken of the amount of said costs, in truth and in fact belonging to, or accruing to, said Patrick Macklin, and that said amount be credited to this plaintiff on the costs set forth on, and in, said execution and on said judgment against said Macklin, and plaintiff be only required to pay of said costs the balance remaining after deducting the amount so belonging to, or accruing to, said Patrick Macklin, and that *said Staed be restrained and enjoined from taking, making or maintaining said levy under said execution, or from enforcing the same, if any levy has been made*, or from summoning any persons as garnishees thereunder, and be enjoined from, *in any manner, proceeding to enforce said execution* or paying any money realized under said execution, if any, until further orders and decree of this court, and for such other and further relief as may be just."

On this petition one of the circuit judges in vacation issued a restraining order against the defendant sheriff. The order was made on condition that the plaintiff, besides his ordinary injunction bond, give a bond to the sheriff, as trustee for other parties than Macklin entitled to costs on the injunction, to pay them what was admittedly due to them as soon as the exact amount would be ascertained. The plaintiff gave such a bond, but afterwards moved that the same be cancelled as unwarranted by law. The circuit court overruled the motion, and the plaintiff excepted and still excepts. The defendants thereafter filed a general demurrer to the plaintiff's petition, which the court sustained, and, the plaintiff declining to plead further, judgment was entered against him on the demurrer,

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from which judgment he prosecutes the present appeal.

The plaintiff's first assignment of error relates to the action of the court in refusing to cancel the additional bond exacted from him as a condition precedent to granting the injunction. This assignment rests upon an entire misconception of the plaintiff's rights. It is evident that, upon the statements of the petition, the plaintiff was entitled to no injunction whatever, unless he first tendered the amount which was admittedly due. That costs, the validity of which was not questioned, were due to other parties than Macklin stands conceded, and for that ground alone the court would have been justified in refusing an injunction altogether. *Overall v. Ruenzi*, 67 Mo. 203–207; *Dickhaus v. Olderheide*, 22 Mo. App. 76–79. It is no answer to say that the plaintiff did make a tender to pay such costs *as soon as ascertained*. It was his duty to ascertain them, and make a tender, before he could ask for the equitable interposition of the court, and the difficulty of the task furnishes no exoneration from the duty. The ordinary injunction bond would have furnished no security to any person not a party to the proceeding, nor interested in the subject-matter of the controversy (Revised Statutes, 1889, sec. 5498), since conditions inserted in an injunction bond in excess of its statutory requirements are unenforceable by anyone. *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6. Beyond this we cannot conceive how the plaintiff, having obtained the benefit of an injunction on certain terms, could reject the terms and still claim the benefit of the order. There would be no merit whatever in the first assignment of error, even if the point were material.

The second assignment of error presents a very grave question. Conceding that the facts stated in the petition furnish grounds for the interposition of a

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court of equity, on what principle can the circuit court interfere with the process of the supreme court of the state? The execution sought to be enjoined in this case is not the execution of the circuit court of the city of St. Louis, but that of the supreme court. It was decided as early as *Pettus v. Elgin*, 11 Mo. 411, that an injuction cannot, on the application of a defendant, issue from one court to enjoin an execution from another, although the courts be of co-ordinate jurisdiction. That has always been the law of this state. In *Mellier v. Bartlett*, 89 Mo. 134, where the question arose on a motion to quash, Judge Black, who delivered the opinion, said: "The general rule undoubtedly is that every court has the exclusive control of its process, and no other court has a right to interfere with or control it," citing *Nelson v. Brown*, 23 Mo. 19, and *Keith v. Plemmons*, 28 Mo. 104. The learned judge adds: "The principles which are at the foundation of the cases before cited are, that each court has the sole control of its process, and that the sheriff of the county to which the execution is sent is, as to that writ, the officer of the court from which the writ emanated." The fact that the supreme court cannot issue an original writ of injunction, as decided in *Lane v. Charless*, 5 Mo. 285, does not invest any other court with power to enjoin the process of the supreme court; it *at most* shows that cases may arise where an equitable right may be lost for want of a proper tribunal to give it effect. But no reason is apparent why the supreme court could not have granted relief in another form to the plaintiff (provided he was entitled to it), as every court has an inherent power to control its own process.

The want of jurisdiction affirmatively appears from the allegations in the plaintiff's petition. The demurrer thereto was, therefore, properly sustained, even though it

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was not placed on that ground. Jurisdiction of the court over the subject-matter of the action is never waived. Revised Statutes, 1889, section, 2047. As we encounter this jurisdictional question upon the threshhold and must decide it, we have neither the power nor the inclination to enter into the merits of the controversy. For the purposes of this case it is immaterial whether the case of *Mullen v. Hewitt*, 103 Mo. 639, furnishes any authority by analogy for denying equitable relief to the plaintiff upon the facts stated in the petition.

The judgment is affirmed. Judge BIGGS concurs. Judge BOND concurs in the result.

CONCURRING OPINION.

BOND, J.—I think the ruling of the trial court in sustaining a general demurrer to appellant's petition, for the reason that it did not state a cause of action, should be affirmed by this court on *that ground*. According to the allegations of the appellant's petition it seeks to enforce a judgment obtained against the respondent, Patrick Macklin, more than ten, and nearly twenty, years before the institution of the present suit.

The alleged equities are that Patrick Macklin is, and has been, insolvent since 1875, and, therefore, the appellant, who became the assignee of said judgment in 1877, has been unable to enforce execution thereof; that said Patrick Macklin is the real owner of the bulk of a judgment of $750 recently rendered against the appellant, and in favor of Macklin and others, by the supreme court of this state for certain costs, which latter judgment said Macklin is endeavoring to enforce against the appellant. The prayer is for an accounting to ascertain the interest of Patrick Macklin in the joint judgment held by himself and others, and the application of the amount due Macklin *personally* under the

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judgment of the supreme court to the satisfaction *pro tanto* of the judgment assigned to the appellant, and to that end for an injunction against the enforcement of said judgment of the supreme court.

It has been distinctly announced by the supreme court that a judgment, which has lain dormant for more than ten years, does not entitle its owner to any relief in equity beyond that of a *general creditor* of the defendant in the judgment. *Mullen v. Hewitt*, 103 Mo. 639. This is *decisive* of the correctness of the ruling of the trial court in sustaining a general demurrer to the allegations of plaintiff's petition. It is not necessary in this case to discuss the question as to the power of the circuit court, in the exercise of the full chancery jurisdiction devolved upon it in this state, to enjoin a judgment at law even of the supreme court in a proper case, and for equitable defenses arising *since* their obtention.

The affirmative of this proposition is not lacking in support. *McClellan v. Crook*, 4 Md. Ch. 398; *Humphreys v. Leggett*, 9 How. U. S. 297; affirmed, 21 How. 66, and 4 Otto, 658; *Perkins v. Woodfolk*, 8 Bax. (Tenn.) 411, 415; *Smith v. Van Bebber*, 1 Swan, 110, 114; *Kinzer v. Helm*, 7 Heisk. 672; *Palmer v. Malone*, 1 Heisk. 549; *Greenfield v. Hutton*, 1 Bax. (Tenn.) 216; *Montgomery v. Whitworth*, 1 Tenn. Ch. 174; High on Injunctions, section 265, last clause; Spelling on Extraordinary Relief, section 153. I am, therefore, unwilling to decide this question until necessary, and upon the fullest consideration.

For these reasons I concur in so much of the opinion of my associates only as affirms the ruling of he lower court.

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W. H. BARNETT, Appellant, v. W. NOLTE, Respondent.

St. Louis Court of Appeals, November 21, 1893.

1. **Justices' Courts:** SUIT ON PROMISSORY NOTE: ELECTION OF THEORY OF ACTION. When suit on a promissory note is brought before a justice of the peace against one whose name is written on the back of the note above that of the payee, the plaintiff may be required to elect in the circuit court on appeal, if he has not done so theretofore, in what capacity he seeks to charge the defendant—whether as joint maker, indorser, surety or guarantor—and is bound by his election, when made.

2. **Promissory Notes:** DISCHARGE OF PARTY BY MATERIAL ALTERATION. The material alteration of a promissory note discharges a party to it, if it is made without his consent.

*Appeal from the St. Louis City Circuit Court.*—HON. JOHN A. HARRISON, Special Judge.

AFFIRMED.

*T. J. Rowe* for appellant.

*J. Hugo Grimm* for respondent.

ROMBAUER, P. J.—The plaintiff, who is indorsee of a promissory note, instituted suit thereon against the defendant before a justice of the peace. The note sued upon was filed with the justice as the only statement of a cause of action. As the defendant's name appeared on the back of the note above that of the payee, and as it furthermore appeared in evidence that it was put there before the payee signed his name, the plaintiff's counsel was asked upon the trial of the cause in the circuit court in what capacity he sought to charge the defendant, and replied as *indorser*. The plaintiff offered no evidence tending to show a presentation of the note to the maker at maturity, or a notice of its dishonor to the defendant. The court rendered judgment in favor of the defendant, and the plaintiff appeals.

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It is apparent that the judgment was the only admissible conclusion of law upon the evidence. One who writes his name on the back of a note, of which he is neither payee nor indorsee, is *prima facie* a joint maker, whether the note is negotiable or not. *Powell v. Thomas*, 7 Mo. 440; *Lewis v. Harvey*, 18 Mo. 74; *Schneider v. Schiffman*, 20 Mo. 571. He may show, however, against anyone, except an innocent holder for value before maturity, that it was the understanding of the parties, at the time, that he was to be held as indorser or as guarantor or as surety only. *Beidman v. Gray*, 35 Mo. 282; *Schneider v. Schiffman*, *supra*; *Noll v. Oberhellmann*, 20 Mo. App. 336. The plaintiff, when he filed the note before a justice as his only statement, could have proceeded against the defendant upon it either as maker or indorser or surety or guarantor, but he had to elect in what capacity he sought to charge the defendant. *Bremen Bank v. Umrath*, 42 Mo. App. 525. He elected upon the trial to charge him as indorser, and is bound by that election. *Perry v. Barret*, 18 Mo. 140. Having failed to adduce sufficient evidence which would thus charge the defendant, he must necessarily fail.

The plaintiff now contends that the defendant did not defend on that theory in the circuit court. It is immaterial what the theory of the defendant's evidence was, as long as all the evidence fails to show any cause of action upon the plaintiff's part. We may add, however, that, even if this insuperable objection were out of the way, we could not disturb the judgment, since there was substantial evidence to show that the note had been materially altered without the defendant's consent after he had indorsed it, which under the settled law of this state discharged the defendant, if he so elected. *Haskell v. Champion*, 30 Mo. 139; *Evans v. Foreman*, 60 Mo. 449.

The judgment is affirmed. All concur.

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ORDER OF RAILWAY CONDUCTORS OF AMERICA v. ELLA KOSTER, Respondent, and SARAH E. LALLY and JOHN LALLY, Appellants.

**St. Louis Court of Appeals, November 21, 1893.**

1. **Benefit Societies:** NATURE OF INSURANCE AFFORDED. A benefit certificate differs from an ordinary policy of life insurance, in that it speaks with reference to the conditions existing at the death of the member whose life has been insured by it.

2. ———: ———: DESIGNATION OF BENEFICIARY. Accordingly, when the status of the beneficiary under such certificate is the main, if not the sole, inducement to the insurance,—as where the certificate is in favor of the wife of the insured, and she is designated mainly by that relationship—the rights of such beneficiary lapse, if that status does not exist at the time of the death of the insured.

3 ———: ———: INSURABLE INTEREST OF BENEFICIARY. And when the laws of the benefit society stipulate that the beneficiary must have an insurable interest in the life of the insured member, that interest must exist at the death of such member. Accordingly, a divorced wife who has remarried, and moreover has no living issue by the insured member, is not under such laws entitled to the benefits.

*Appeal from the St. Louis City Circuit Conrt.*—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

*Orr, Christie & Bruce* and *Joseph S. Dobyns* for appellants.

"A policy of life insurance or a designation of beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary ceases, unless it is otherwise stipulated in the contract." Bacon on Mutual Benefit Societies, sec. 253, and cases cited; *Connecticut, etc., Ins. Co. v. Schaffer*, 94 U. S.

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457; *McKee v. Ins. Co.*, 28 Mo. 383; *Clark v. Allen*, 11 R. I. 439; *Dalby v. Ins. Co.*, 15 C. B. 365; *Campbell v. Ins. Co.*, 98 Mass. 381; *Ins. Co. v. Baum*, Ind. 236. In respect to the doctrine of the cessation in insurable interest, as to its effect upon the rights of the beneficiary, benefit certificates are governed by the same rule as insurance policies. *Martin v. Stubbings*, 126 Ill. 387; *Elkhardt Mut. Aid Ass'n v. Houghton*, 98 Ind. 149; *Mutual, etc., Ass'n v. White*, 9 N. W. Rep. (Mich.), 497. The Iowa Statute under which the plaintiff order was incorporated, authorizing, as it does, the designation of a legatee or legal representative (administrator) as beneficiary, is not restrictive in its operation. *Martin v. Stubbings*, 126 Ill. 387; *Bloomington Mut. etc., v. Blue*, 120 Ill. 121; *Masonic Ass'n v. Bunch*, 19 S. W. Rep. (Mo.), 29. The designation by a member, A. B., of his beneficiary as "Mrs. A. B." is held to mean the wife living at the time of the designation, and not a subsequent wife who becomes his widow. *Day v. Case*, 43 Hun, 179; *Richardson v. Richardson*, 75 Me. 570. The right of the beneficiary depends upon contract, and not upon status. Niblack on Mutual Benefit Societies, 241; *Jackman v. Nelson*, 17 N. E. Rep. (Mass.), 529; *Duncan v. Central Verein*, 7 Daly, 168; *Story v. Williamsburg, etc., Ass'n*, 95 N. Y. 474.

*Sale & Sale* and *F. H. Bacon* for respondent.

The appellant, Mrs. John Lally, is not the beneficiary designated in the certificate. She is nowhere mentioned by name; the only designation being "wife." *Bell v. Smalley*, 45 N. J. Eq. 478; *In re Morrieson*, 40 Ch. Div. 30. The certificate, so far as the relationship of the beneficiary to the member is concerned, speaks as of the time of the member's

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death. Under H. A. Koster's certificate, payable to his "wife," the wife of John Lally is not the person intended, and she does not take. *Tyler v. Odd Fellows', etc., Ass'n*, 145 Mass. 134; *Union Mut. Aid Ass'n v. Montgomery*, 70 Mich. 587; *Chartrand v. Brace*, 26 Pac. Rep. 152. The designation of beneficiary is an act testamentary in its character and should therefore be construed as such. *Masonic, etc., Ass'n v. Bunch*, 109 Mo. 560; *Union Mut. Aid Ass'n v. Montgomery*, 70 Mich. 587; 38 N. W. Rep. 588; *National Aid Ass'n v. Kirgin*, 28 Mo. App. 80; *Chartrand v. Brace*, 26 Pac. Rep. 152; *Duvall v. Goodson*, 79 Ky. 244; *Thomas v. Leake*, 67 Tex. 469.

ROMBAUER, P. J.—This is a contest between the respondent and the appellants as interpleaders for a certain fund paid by plaintiff into court. The trial court awarded the fund to Ella Koster. Sarah E. Lally and her husband, John Lally, who prosecute this appeal, assign for error that upon the evidence the court should have awarded the fund to Sarah E. Lally.

We find the facts to be as follows. The plaintiff is a mutual benefit association or order, organized under a statute of the state of Iowa, which provides among other things:

"Section 7. No corporation or association organized or operating under this act shall issue any certificate of membership or policy to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such insured member, nor shall any such certificate be assigned, except an endowment certificate; and any certificate issued or assignment made in violation of this section shall be void. Any member of any corporation, association or society,

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operating under this act shall have the right at any time, with the consent of such corporation, association or society, to make a change in his beneficiary *without requiring the consent of such beneficiary.*"

The laws of the order contain the following provisions:

"Article 2. Its object is to aid and benefit disabled, and the families of deceased members of the Order of Railway Conductors."

"Article 18. An applicant may designate in his application some person or persons to whom benefit shall be paid in the event of his death, and the secretary shall enter such designated name or names upon the register of the department, and also upon the certificate of membership. Any person desiring to change the name or names of the person or persons to whom benefit is payable shall make the request in writing upon a blank provided for that purpose, which request must be certified by the division secretary under the seal of the division, and forwarded to the secretary with the certificate of membership. Upon receipt of such request in proper form, the secretary shall make the requested change on the register, *provided no benefit shall be made payable to any one not having an insurable interest in the life of the member.*"

"Article 20. In case the designated payee of a member should not survive him, the benefit shall be paid to the first named who shall survive him, as follows:

"*First.* In accordance with the provisions of the lawful will of the deceased, should one be left.

"*Second.* To the widow of the deceased.

"*Third.* To the child or children of the deceased.

"*Fourth.* To the mother of the deceased."

H. A. Koster made application for membership in the order in November, 1886, when the present

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Sarah E. Lally was his wife. His application, among other things, contained the following: "In the event of my death, I hereby direct that the sum, to which my heir or heirs may be entitled to by my membership, be paid to my wife, Mrs. H. A. Koster;" also the following: "I agree to conform in every respect to the by-laws, rules and regulations now in force, *or which may be lawfully adopted hereafter.*" When Koster made this application, the last clause of article 18 hereinabove set out in italics was not in force. The same was adopted only in January, 1891. That fact, however, in view of section 7 of the statute, and that part of the application of the assured which is italicised above, is immaterial. The plaintiff on this application issued to the assured a certificate, stating among other things: "In event of his death, benefit is to be paid to Mrs. H. A., the person named in the application, who bears the relationship of wife to the member holding this certificate." Subsequently the order becoming incorporated, this certificate was recalled and another certificate issued in lieu thereof, the material portions of which are as follows:

"This is to certify that the Mutual Benefit Department of the Order of Railway Conductors, in consideration of the statements and representations made in the application of H. A. Koster for membership therein, a copy of which application is hereto attached, and the sum of $2.50, and the payment of $1 for each expense assessment, and the further payment to the Mutual Benefit Department of the Order of Railway Conductors of the sum of $1 for each and every claim for the death or disability of a member of class 'A,' of the department for which an assessment is made, so long as he shall remain a member of said class 'A,' said payments to be made within sixty days from the date of notice, do promise and agree to and with the

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said H. A. Koster, to pay or cause to be paid to ——— wife ——— or in case the person or persons named therein do not survive him, then as provided in article 20 of the by-laws governing the department, $1 for every member of class 'A' who shall pay the assessment for the death of said H. A. Koster after due notice and satisfactory evidence of such death is received."

This certificate was in force at the date of H. A. Koster's death, which occurred March 26, 1891.

We further find that the Mrs. H. A. Koster named in the application was the then Sarah E. Koster, now Sarah E. Lally, and that she separated from Koster in December, 1889, and obtained a decree of divorce from him *a vinculo matrimonii* on the sixth of March, 1890, such decree being silent on the question of alimony but restoring to Mrs. Koster, at her request, her maiden name. Within two months thereafter Mrs. Koster was married to her present husband, Lally, and ever since that date the feelings of Koster towards here were exceedingly bitter. On March 4, 1891, while Koster was residing with his sister Ella (one of the interpleaders) in Vincennes, Indiana, he caused a letter of the following tenor to be written by a friend to the grand secretary of the order, who resided in Cedar Rapids, Iowa:

"Enclosed please find my policy, which I wish transferred from my wife to my sister, Ellen Koster. Kindly return as early as possible and oblige," etc.

On the seventh of March the grand secretary replied to him, acknowledging the receipt of the letter, and adding:

"I enclose herein a blank upon which please make your request for change of beneficiary, and, after having it certified by your secretary, return to me, and the requested change will be promptly made, and your

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certificate returned to you through the secretary of your division."

The term *your secretary* used in this letter refers to the division secretary of the division in which Koster was. This secretary resided in Texarkana, Texas. The letter of the grand secretary was by mistake directed to Koster at Little Rock, Arkansas, which was his former place of residence, and did not reach him at Vincennes, Indiana, where he then was, until about the sixteenth of March, 1890. Upon receiving the grand secretary's letter, Koster filled the blanks in the certificate of request, indicating the change desired, signed the certificate and put it in his pocket with the avowed intention of taking it with him when he returned to Little Rock, to which place he intended to repair shortly. There is no credible evidence that this certificate of request was ever seen thereafter, and its subsequent fate is a mere matter of conjecture. Koster was suddenly taken worse on the twenty-fifth of March, 1891, and died on the day following. We find no evidence of any change of intention on his part after he caused the letter of March 4, 1891, to be written,—nor on the other hand is there any evidence that the order ever waived the requirement of a formal request for a change of the beneficiary which it had a right to insist on under article 18 of its laws.

In applying the law to the facts thus found, we will adopt the following part of the very apt language used by the learned judge of the trial court in deciding the case: "It will be seen that the articles of association are broader than the laws of the order in respect of the objects of the benevolence provided for, and we must look to the laws of the order in preference to the articles of association. The laws of the order cannot go beyond the scope of the articles of association, but they need not cover the whole scope. Under its

articles this order may make a law to provide not only for the families, but also for the devisees of its deceased members; but, if it sees fit, it may so shape its laws as to limit its beneficiaries to the families only, or to the widows only, or to the children only. If, therefore, either one of these claimants appear in a character not provided for in the laws of the order, although embraced in the terms of the articles of association, then he or she is in the attitude towards the order of one for whom it was lawful for the order to have made provision, but for whom no provision has been made."

"A benefit certificate of this kind has some of the features of an insurance policy, but it also has its point of difference, and, in the particular we are now considering, it is testamentary in its character. The rule of the law of insurance, that, if one have an insurable interest at the date of the policy, the policy is not vitiated by termination of that interest, does not apply in a case like this. This act is testamentary in its character in the respect that it speaks at the death of the member. As long as the lady, who is now Mrs. Lally, filled the description given in the certificate she was under its protection, but, when she ceased to fill that description, her interest in the certificate ceased. On the death of H. A. Koster the certificate, speaking for the first time, called for his wife and there was none to answer."

It is evident that under the facts as we find them the law, which is correctly stated in the last paragraph of the trial judge's opinion, is decisive against Mrs. Lally's claim. That a benefit certificate is different from an ordinary life insurance policy, viz., that it is testamentary in its character, is well settled and has been repeatedly decided in this state. *Masonic Benevolent Ass'n v. Bunch*, 109 Mo. 560, 580; *Expressmen's Aid Society*



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*v. Lewis, Adm'r*, 9 Mo. App. 412; *National American Ass'n v. Kirgin*, 28 Mo. App. 80. That proposition is conceded by the appellant, but her counsel claims that, although the designation of the beneficiary speaks from the death of the assured, it does not follow that a descriptive designation must continue applicable to the person described up to the time of death. But what is descriptive designation, after all? When the descriptive designation is used to identify *the person*, the fact that it applies to the person no longer at the date of death is immaterial, because the beneficiary is the person and the description of his or her status a mere identification of the person; but when the status of the beneficiary is the main, if not the sole, inducement for the insurance, the name becomes a mere descriptive designation and the object of the benefit is, and always remains, in the person filling the particular status.

It is immaterial whether in this case we consider the application, the entry on the register, and the first and second certificates together for the purpose of ascertaining the beneficiary, or whether we take the last certificate alone as controlling. In either event we must reach the same conclusion The application says "*my wife, Mrs. H. A. Koster*." The first certificate says "Mrs. H. A., the person named in the application, who bears the relationship of *wife* to the member holding this certificate." The second certificate says the money is to be paid to —— *wife* ——. All these paper taken together merely refer to the same person, namely the wife of H. A. Koster. The *wife* is in each instance the main designation of the beneficiary, because Mrs. H. A. Koster means no more than H. A. Koster's wife. If there is no wife at the date of the death, the certificate *lapses*, unless another beneficiary has been substituted by the member, or by the laws of the order. *Masonic Mutual Relief Ass'n v. McAuley*, 13 D. C. (2 Mackey) 70.

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In *Taylor v. Odd Fellows' Mutual Relief Ass'n*, 145 Mass. 136, the case involving the rights of a divorced wife, the court declined to decide whether the validity of a description is to be determined at the outset by the relation *then* existing between the member and beneficiary, but the court was clear that, to make the description available after death, there must then be such a relation to the deceased, as is contemplated by the agreement and laws of the order.

Now, it cannot be contended that this divorced wife, who had married another, could by any possible construction be designated as the wife of the member at the date of his death. Nor was she within the contemplation of the laws of the order. She had no insurable interest in the life of Koster even under the liberal view taken in *McKee v. Insurance Company*, 28 Mo. 383, 385. He was under no obligation to support her, and no children of the marriage were living. At the date of the death of the member she fell under no class for whom the laws of the order made provision.

We need not decide the second branch of this case, which relates to a substitution of another beneficiary by the member. As we said in the case of *McFarland v. Creath*, 35 Mo. App. 112, the only question before us is whether the appellant has a right to the fund. If she has not, it is, as far as her appeal is concerned, immaterial what disposition the court made of it.

With the concurrence of all the judges, the judgment is affirmed.

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HOWARD BROLASKI, Respondent, v. ALBERT A. AAL, Appellant.

St. Louis Court of Appeals, November 21, 1893.

**The Evidence** in this cause is considered, and is to *held* justify the judgment therein.

*Appeal from the St. Louis City Circuit Court.*—HON. JACOB KLEIN, Judge.

AFFIRMED.

*Laughlin, Wood & Tansey* for appellant.

*Dodge & Mulvihill* for respondent.

ROMBAUER, P. J.—This action was instituted before a justice of the peace. The plaintiff's statement filed there alleged, in substance, that he entered into a contract with the defendant, whereby the latter, in consideration of $25 paid to him, agreed to turn over to the plaintiff an unexpired lease for certain premises in the city of St. Louis; that the defendant broke that contract, to plaintiff's damage in the sum of $293, for which the plaintiff prayed judgment.

The plaintiff recovered judgment before the justice for $224, and upon trial anew in the circuit court again recovered judgment for $25. The defendant again appeals, and, although he files no formal assignment of errors, we gather from his brief that he claims that the verdict and judgment are not supported by substantial evidence.

The plaintiff, among other evidence, offered the following receipt executed by the defendant:

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"ST. LOUIS, January 19, 1892.

"Received of Howard Brolaski $25, deposited for the rent of the building, 409 North Broadway, according to the following agreement: F. Siegel & Bro. agree to turn over the lease on said building at same price paid by them, rent to date from January 1, 1892. Howard Brolaski to pay back bonus paid by F. Siegel & Bro., as agreed.

"F. SIEGEL & BRO.
"A. AAL."

The evidence concedes that this $25 was paid to the defendant by the plaintiff's agent, and there is no evidence that it was ever returned. On the question whether the plaintiff's agent knew, when he paid the money, that the defendant was acting as agent of F. Siegel & Bro. only, and not on his own behalf likewise, or whether he was acting both on his own behalf and for F. Siegel & Bro., the evidence was conflicting. That question was submitted by the court to the jury on appropriate instructions. The court instructed the jury in substance that, if the defendant contracted as agent only, and plaintiff knew the fact, or if F. Siegel & Bro. or the defendant were not guilty of any breach of the contract stated in the memorandum, the plaintiff could not recover. These instructions stated the law correctly. The memorandum itself is sufficiently ambiguous to admit parol evidence on the main question involved. *Ziegler v. Fallon*, 28 Mo. App. 295, 299, and cases cited. On the face of it A. Aal might be either an independent contractor, or a member of the firm of F. Siegel & Bro., or a mere agent for the latter. Nor was the memorandum the foundation of the plaintiff action; it was but a mere receipt offered in evidence with his other proof.

We see no error in the record, and affirm the judgment. All the judges concur.

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## CHARLES ROBYN, Respondent, v. SUPREME SITTING ORDER OF THE IRON HALL, BRECK JONES, Receiver, Appellant.

**St. Louis Court of Appeals, November 21, 1893.**

1. **Benefit Societies:** CONSTRUCTION OF CERTIFICATE OF INSURANCE. A benefit certificate provided on stipulated conditions for the payment to the holder of a sum of "not exceeding $1,000," but contained no other provision for the determination of the amount of the liability; nor did the constitution or by-laws of the benefit society help out the certificate in this regard. *Held,* that the certificate entitled the holder to the full amount named, to-wit, $1,000.

2. ———: INADEQUACY OF CONSIDERATION FOR BENEFITS CONTRACTED FOR. The certificate provided for the payment of said sum at the end of seven years, and required as a condition thereto that the the holder of it should pay the benefit society such assessments as might be made during that period. The assessments made by the society during these seven years against the holder of the certificate amounted to only $351. *Held,* that this fact could not operate in reduction of the claim under the certificate.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*R. M. Nichols* for appellant.

*Lubke & Muench* for respondent.

BIGGS, J.—This is an action upon a matured certificate of insurance, issued by the defendant order, for $1,000. The certificate, which is dated on the twenty-ninth day of July, 1885, is as follows:

"No. 10,809. $1,000.00.

"RELIEF FUND CERTIFICATE.

"The Supreme Sitting Order of the Iron Hall.

"For and in consideration of that Charles Robyn

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has become a member of local branch, number 229, Order of the Iron Hall, and has obligated himself to obey all lawful commands of this Order, whether emanating from the local branch of which he may be a member, or from this Supreme Sitting, or from any other duly constituted authority, and of the sum of $2.50, which he had paid to said local branch as an assessment on account of the relief fund of this order, and of further assessments of a like amount to be paid as may be regularly and lawfully called for, and of an explicit compliance with all the laws, rules and usages of this order, also all laws enacted, and especially with the conditions herein set forth, do grant unto the said member this certificate, and declare him to be entitled to all the rights and privileges properly belonging to members of his rank and standing, including a benefit of not exceeding

"ONE THOUSAND DOLLARS,

from the relief fund of this order, which sum shall be paid in the manner, and upon the conditions hereinafter mentioned, to wit:

"In case the said member shall continue to pay all assessments, dues and demands, which may be legally made against him, or against this certificate, for the full term of seven years from its date, making all such payments punctually within the prescribed time, and shall in all particulars maintain himself in good standing in the order, then the said member shall be entitled to a sum not exceeding the principal amount named herein, less the amount which he has already received as benefits from the order on account of sickness or other disability, or otherwise."

The other conditions in the certificate need not be set out.

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It is alleged in the petition that the plaintiff had fully complied with all the terms and conditions of the contract, that the certificate matured on the thirtieth day of July, 1892, and that the amount named in the certificate was due to plaintiff, which the defendant had declined to pay.

The action was begun on the nineteenth day of August, 1892, and a few days thereafter Breck Jones was appointed receiver for the defendant order. He was permitted by the court to defend the action. After a general denial his answer was to the effect that the company was insolvent; that the certificate was merely an obligation of indemnity for a period of seven years; and that the plaintiff had not paid as a consideration for the claim of $1,000, a sum exceeding one-half of that amount.

The plaintiff's evidence tended to prove that he had never drawn any benefits from the defendant order, and that during the seven years he had fully and promptly paid all assessments that were levied against him. The plaintiff read in evidence the certificate; and he also offered and read in evidence paragraph two, of section three, of article one of the constitution of the order, which provides that an amount of not more than $1,000 shall be paid to the holders of certificates when they have held a continuous membership in the order for seven years without suspension, provided, however, that the sum total drawn from the order by any of its members shall never exceed, both in sick, disability and other benefits, the sum named in the certificate.

The plaintiff also read in evidence section one of the relief fund laws of the order, to the effect that members shall participate in the relief fund, as they may severally elect, either in the sum of $1,000, or specified smaller sums according to the amount of the

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assessments agreed to be paid; and the table of rates and benefits exhibited in that section contains in the last column, "Benefit *paid* at the end of seven years, $1,000," which was the highest amount that any beneficiary could receive.

Section 4, of the relief fund laws, which was also read in evidence, provides: "The sum as prescribed in the member's certificate *shall be paid* to the member * * * in case of * * * maturity, and such *payment* shall be made as hereinafter prescribed and according to the conditions set forth in said certificate."

At the close of the plaintiff's case the receiver asked the court to declare as a matter of law that the plaintiff could not recover. This instruction the court refused. The receiver also asked the following instructions, which were likewise refused:

"The court declares the law to be that, if it finds for the plaintiff, it will assess his damages in an amount equal to the assessments actually paid by him to defendant under his said contract of membership, together with interest thereon at the rate of six per cent. per annum from the date of bringing this suit, in a sum, however, not greater than one thousand dollars ($1,000) less any amount or sum of money which he may have received during his said membership of defendant as sick or other benefits."

"The court declares the law to be that, if it finds for the plaintiff, it will assess his damages in an amount equal to the assessments actually paid by him to defendant under his said contract of membership, together with interest thereon at the rate of six per cent. per annum from the date of the respective payments of said assessments, in a sum, however, not greater than one thousand dollars ($1,000), less any amount or sum of money he may have received, during his said membership, of defendant as sick or other benefits."

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Thereupon the court, sitting as a jury, found the issues for the plaintiff, and entered a judgment against the defendant for the amount of the certificate and six per cent. interest thereon from the date of the institution of the suit. The receiver has appealed.

The defendant's instructions as to the measure of damages were submitted on the theory that the certificate was nothing more than a contract of indemnity, and that consequently the damage suffered must be measured by the amount paid in. In support of this it is urged that there was no promise to pay anything; or, if there was, there was no agreement to pay a specified sum; that the language of the certificate, that the plaintiff would at the end of seven years be entitled to a sum "not exceeding $1,000" necessarily implied that the liability might be for a smaller sum; that this language, when read in connection with the constitution and by-laws of the order, is susceptible of the construction that an account was to be kept between the plaintiff and the order, and that at the maturity of the contract the defendant's liability was to be fixed by the amount of the assessments paid by the plaintiff, not to exceed, however, $1,000, thus making the contract strictly one of indemnity.

We must confess that we have been unable to fully comprehend the force of the argument made in support of this position. When the certificate, the constitution, and the by-laws of the orders are considered, it seems to us that we have an absolute contract of insurance on the tontine plan, in which the defendant agreed to pay to the plaintiff at the expiration of seven years $1,000, provided he observed the rules and regulations of the order and should pay all lawful assessment against him. It is true that the language employed in the certificate, standing by itself, would seem to imply a minimum and maximum liability; but there is nothing indicating how

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a minimum liability could be fixed. In the absence of this, the fair inference to be drawn is that it was understood that the plaintiff should receive the full amount named in the certificate, provided he performed his part of the agreement. Any other construction would make the insurance a cheat and a fraud. There is a class of benefit certificates which provide that a certain assessment against the members of the association, not exceeding a stated amount, shall be paid to the holder or beneficiary in each matured certificate. It has been held that the liability on such a certificate was *prima facie* the amount stated therein, and that to reduce it the association must show that the avails, or the probable avails, of such assessment would fall short of the sum named in the certificate. May on Insurance, sec. 563*a*; *O'Brien v. Home Benefit Society*, 117 N. Y. 310. But in the case at bar no contingency is stated which would result in reducing this *prima facie* liability, and it is reasonable to assume that nothing of the kind was contemplated.

The case of *Lueders' Ex'r v. Hartford, etc. Co.*, 12 Fed. Rep. 465, presented a similar state of facts. Touching the extent of the recovery, Judge TREAT said: "In the absence of any proof to the contrary, the sum recoverable should be against the corporation for the maximum insured. Any other rule would make this insurance scheme a mere delusion and snare. * * * If the defendant's theory as to the true construction of the contract * * * is to obtain, then a policy like the present is of little worth. True, if a person, *sui juris*, chooses to make a foolish contract, he must abide by its terms; but should not the contract be so construed as to make its contemplated benefits available? * * * This court cannot hold otherwise than that, when suit has to be brought, the recovery should be for

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the maximum insured, unless the defendant shows by pleadings and proof that said sum should be reduced."

We, therefore, conclude that the court did right in refusing the defendant's instructions.

During the seven years the plaintiff, by way of assessments, paid into the company $351. It is now urged that a construction of the contract, which would require the defendant at the end of seven years to pay to him $1,000, is unconscionable and therefore non-enforcible. It is hard to understand how the defendant expected to maintain itself on such a basis. But it has only itself to blame; for there was no limit as to the number of assessments, and there was nothing to prevent the defendant from accumulating a sufficient fund by means of assessments and lapses to meet its matured obligations. As it is, it does not lie in its mouth to say that the contract was unreasonable, since the plaintiff has fully performed it on his part by paying all assessments against him. The contention is itself unreasonable, and absolutely without merit.

Finding no error in the record, the judgment of the circuit court will be affirmed. All the judges concur.

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CARTHAGE MARBLE AND WHITE LIME COMPANY, Respondent, v. MIRIAM B. BAUMAN *et al.*, Appellants.

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St. Louis Court of Appeals, November 21, 1893.

1. **Mechanics' Liens:** AGENCY OF HUSBAND FOR WIFE. The evidence in this cause is considered, and it is *held* to justify the submission to the jury of the issue whether a contract in writing, entered into by a husband in his own name for the erection of a building on land of his wife, had been made by him as agent for the wife, so as to render the land chargeable with a mechanic's lien for materials furnished for the building.

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2. ——: ENTIRETY OF JUDGMENT: EFFECT OF APPEAL. The judgment in an action by a subcontractor to enforce a mechanic's lien is an entirety. Accordingly, when in the trial court it is against both the original contractor personally and the claim of lien, the reversal of it by this court on appeal by the plaintiff vacates it altogether, and necessitates a retrial of the cause in both respects.

3. ——: COMPETENCY OF ADMISSION BY ORIGINAL CONTRACTOR. In such an action the admission by the original contractor of the correctness of the account in suit is competent evidence against him, and is therefore properly admitted against the objection of the landowner, though the latter may have its effect limited by instruction

4. **Instructions:** DEFINITION OF EXPRESSIONS IN COMMON USE. Words in ordinary use, and not intended in any technical sense, may be employed in instructions without definition. Accordingly, an instruction which submits an issue, whether a husband acted as the agent of his wife in contracting for improvements on her land, is not erroneous because it fails to explain what is necessary to the establishment of the agency.

*Appeal from the St. Louis City Circuit Court.*—HON. LEROY B. VALLIANT, Judge.

REVERSED AND REMANDED (*with directions*).

*M. B. Jonas* and *Rassieur & Schnurmacher* for appellants.

(1) A husband has no power, as such, by a building contract to create a liability of his wife's legal estate to a mechanic's lien. Mere knowledge or approbation on her part, or even directions and suggestions as to the work during its progress, do not amount to either an appointment of him as her agent or an adoption or ratification of his contract. Nor will the fact that the building is to be used as a residence for the wife raise the presumption of authority on his part. *Garnett v. Berry*, 3 Mo. App. 197; *Hughes v. Anslyn*, 7 Mo. App. 400; *Barker v. Berry*, 8 Mo. App. 446; *Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Meyer v. Broadwell*, 83 Mo. 571; *Carthage, etc. Lime Co. v. Bauman*, 44 Mo. App. 386; *Chicago Lumber Co. v. Mahan*, 53 Mo. App. 425; *Conway v. Crook*, 66 Md. 292; *Hughes v. Peters*,

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1 Coldw. 71; *Geary v. Hennesy*, 9 Bradw. 18; 2 Jones on Liens, secs. 1263, 1264; *Hoffmann v. McFadden*, 19 S. W. Rep. (Ark.) 753. The evidence in this case having disclosed that the stonework was done under an express written contract between the contractor and the husband, the law will not raise an implied one on the part of the wife. Nor do the facts warrant the inference of a ratification on her part. *Planing Mill Co. v. Brundage* 25 Mo. App. 268; *Carthage, etc. Co. v. Bauman*, 44 Mo. App. 386. (2) The court erred in giving instruction number 1 for the plaintiff without explaining to the jury the facts, which would justify their finding that Mr. Bauman made the contract with Bornschein as the agent of Mrs. Bauman. The court should never submit to the jury a mixed question of law and fact. The law should be declared by the court, and the facts found by the jury. *State to use, etc. v. Rayburn*, 31 Mo. App. 385; *Boogher v. Neece*, 75 Mo. 383; *Jordan v. Hannibal*, 87 Mo. 673. (3) The court erred in permitting plaintiff to read to the jury, as against these defendants, the statement of the contractor that the plaintiff's claim was correct for a balance of $670.34, it appearing that said statement was made long after he had purchased the materials and completed his work. *Grace v. Nesbit*, 109 Mo. 9; *Deardorff v. Everhartt*, 74 Mo. 37; *Philibert v. Schmidt*, 57 Mo. 211.

*Lubke & Muench* for respondent.

(1) Under the mechanic's lien statute of this state, a married woman is free of disability to contract for the improvement of her land. Revised Statutes, 1889, sec. 6726, p. 1577. And she may contract for such improvement through an agent, who may be her husband. *Carthage, etc. Co. v. Bauman*, 44 Mo. App. 386. Although the contract be in writing, and with the husband alone, yet, if it appears that the wife is the real

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party in interest for whom, and by whose authority, the improvement is made, the wife's land will be bound. *Fischer v. Anslyn*, 30 Mo. App. 317; *Carthage, etc. Co. v. Bauman*, 44 Mo. App. 386; *Chicago Lumber Co. v. Mahan*, 53 Mo. App. 425. (2) The reception in evidence of the account signed by the original contractor was not prejudicial error. (3) Appellant's criticism of the words "as her agent" written in the first instruction given for respondent is without merit. The question of agency was one of fact to be determined by the jury from the evidence. And the words "as her agent" being in common use, there was no necessity to explain them further to the jury. *Holland v. McCarty*, 24 Mo. App. 113.

Biggs, J.—The plaintiff seeks to enforce a mechanics' lien against a building and lot belonging to the defendant, Miriam Bauman, who is the wife of her codefendant, Meyer Bauman. This is the second appeal. (44 Mo. App. 386.)

The plaintiff claims to have furnished the stone for building the house in controversy under a contract with one Bornschein. On the first trial the plaintiff was compelled to submit to a nonsuit as to the lien, the court being of the opinion that it had failed to introduce any substantial evidence that the work done by Bornschein was done under a contract with Mrs. Bauman. Judgment, however, was rendered against Bornschein for $449. It appeared inferentially only that the contract with Bornschein was made with Meyer Bauman, but its nature and terms were not established. We reversed the ruling of the court as to the lien, as in our opinion the acts and conduct of Mrs. Bauman, in reference to the construction of the house, were such as to call for some explanation. On a retrial it was developed that the contract with Bornschein was in writing, and was made by Meyer

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Bauman in his own name. Under the instructions of the court, the jury found that, in making the contract, Bauman acted as the agent or representative of his wife, and they also found that the plaintiff was entitled to a mechanics' lien on the house and lot for $518.90, and judgment was entered accordingly. The defendants have appealed.

At the close of the plaintiff's evidence, and also at the close of all the evidence, the defendants asked an instruction of nonsuit upon the theory that the evidence of Bauman's agency was not sufficient to authorize its submission to the jury. The court refused to direct a nonsuit, and of this the defendants chiefly complain.

The defendants by introducing evidence assumed the risk of helping out the plaintiff's case. To that extent it may be said that they waived their demurrer to the plaintiff's evidence. Hence, in determining this assignment, we must look at all of the evidence. *Eswin v. Railroad*, 96 Mo. 290.

The plaintiff's evidence, bearing on the question of agency, was substantially as follows: Joseph Grable, who was the superintendent of the building, testified that Mrs. Bauman was very often at the house while the work was progressing; that she first objected to the windows, alleging that they were too small, and that she wanted larger ones put in, but that, after talking to the architect, she seemed to be satisfied; that she gave orders about the pantry and kitchen; that she ordered certain changes made, and, in that connection, said: "We are paying big money for this, and I want it right."

George Piesch had the contract for painting the house. After testifying that he saw Mrs. Bauman frequently at the building, he said: "She (Mrs. Bauman) gave me directions about painting some

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floors and varnishing the floors. * * * Have seen her examining the work. I did extra work through Mrs. Bauman; she gave orders to do it."

W. S. Balsom, a carpenter, said that he worked on the house four or five months, and that during the time he often saw Mrs. Bauman on the premises, and that she frequently had conversations with the architect; that she gave the witness directions about the breakfast rooms and the closets, and that she gave the foreman orders how the shelving in the pantry should be fixed.

J. W. Blaine, who was employed in the building as a painter, said that Mrs. Bauman gave orders about the painting, and that she said "that she wanted a good job done."

On the other hand, Mr. and Mrs. Bauman both testified substantially that in building the house Bauman acted on his own responsibility; that he did not consult his wife, except to submit the plans to her for her inspection; that in paying for the house he drew against his private account; and that Mrs. Bauman was in no way connected with any of the contracts for building the house, nor was she known to any of the contractors.

In view of the fact that the contracts for building the house were in writing and in the name of Mr. Bauman, the alleged acts of the wife concerning the building, if they stood alone, might very well be reconciled with a wifely interest in her husband's affairs. But the plaintiff insists that the cross-examinations of the defendants justify the inference that the house was really paid for with Mrs. Bauman's money. It appears from the testimony of both defendants that in 1876 Mrs. Bauman was the owner of a residence on Pine street; that about that time she sold it for $16,000 cash; that Mr. Bauman used the money in



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partly paying for some business property on Olive street, the title to which was taken in his individual name, and is still so held; that in November, 1887, Bauman purchased the lot here in controversy, for which he paid $5,000, taking the title to his wife, and that he afterwards expended $17,000 or $18,000 in making the improvements. While Bauman says that in paying for the lot and house he drew against his private account, which we may assume to be true, yet it is a fair and legitimate inference from his testimony, as well as that of his wife, that the money arising from the sale of the property in 1876 was regarded as belonging to the wife; that Bauman invested it for her benefit; and that in purchasing the lot and in building the house he was refunding to her that money and the reasonable profits arising from its investment. These were the inferences drawn by the trial judge, who is exceedingly careful and prudent, and we do not think that we would be justified in overruling him in this matter. He saw the witnesses and heard them testify, and was in the better position to get at the true facts. With the fact fairly proven that Mrs. Bauman's money paid for the house, her alleged acts of participation and interference in the building of it became quite significant, all of which justified the submission of the question of agency to the jury. We will, therefore, overrule this assignment.

After the stone had been delivered, the plaintiff made out the account therefor, showing a balance due of $670. Bornschein indorsed the account as being correct. Against the objections of the defendant the court permitted the plaintiff to read this paper in evidence.

It seems that on the last trial both parties regarded the contest *solely* between the plaintiff and Mrs. Bauman, and that the sole issue was lien or no lien.

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This, we assume, was on the idea that the first appeal and the judgment of reversal therein in nowise affected the judgment against Bornschein. If this were true, the admission of the paper would have been a technical error. *Grace v. Nesbitt*, 109 Mo. 9. But, in our opinion, counsel misconceived the effect of our judgment of reversal. The judgment enforcing a mechanics' lien in favor of a subcontractor is merely incidental to a judgment in his favor against someone standing in a contractual relation with the owner of the property. *Steinkamper v. McManus*, 26 Mo. App. 51. The lien cannot exist and, in the absence of statute, cannot be enforced, apart from such judgment. Therefore, the first appeal brought up for review the entire judgment, and the reversal vacated it as an entirety. When we consider that there can be but one final judgment in the cause (Revised Statutes, 1889, section 2213; *McCord v. McCord*, 77 Mo. 166; *Caulfield v. Farrish*, 24 Mo. App. 110), the conclusion is unavoidable that there could not be one judgment against Bornschein for the debt, and another at a subsequent term enforcing the lien. Again, the statute requires, in such cases, that the judgment enforcing the lien shall be on condition that the judgment for the debt be first made out of the property of the contractor. This conclusively shows that there can be but one judgment.

Our conclusion is that it was necessary on the second trial for the plaintiff to make out its case against Bornschein. Therefore, the stated account was competent evidence against Bornschein, and Mrs. Bauman was entitled by instruction, if she had seen proper to do so, to have had it so limited.

But, even on the theory on which the case was tried, the admission of the paper in evidence was nonprejudicial. If the lien had been adjudged for the balance claimed under the stated account, then there would

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have been just grounds for complaint. On the contrary, the finding as to the balance due to the plaintiff from Bornschein was based on the testimony of Bornschein himself, who was introduced as a witness by the defendants. He denied the correctness of the stated account in respect of the prices charged for certain portions of the materials furnished. The finding of the jury was in accordance with his testimony.

At the request of the plaintiff the court instructed the jury that, if they found from the evidence "that defendant Miriam Bauman, by and through her husband, acting at her instance or with her consent and approval *as her agent* and for her benefit, made a contract with Bornschein," etc.

It is urged that it was error for the court to so instruct without explaining to the jury the facts that would justify the finding that Mr. Bauman made the contract with Bornschein *as the agent* of his wife.

This objection is completely answered in the opinion of this court in *Holland v. McCarty*, 24 Mo. App. 112. There the word "authority" was used in an instruction. It was claimed that the meaning of the word ought to have been defined by instructing the jury as to what acts on the part of the defendant would amount to such authority. Judge ROMBAUER, in delivering the opinion of the court, said: "We have repeatedly held that words of the English language in ordinary use, when used in no particular technical sense, need not be explained to the jury. The word authority, in the connection in which it was used, was used as a word having a well-defined meaning in common parlance, and no jury composed of intelligent men (as juries under the provisions of the statute are bound to be) could misunderstand it."

Acting upon the idea that the original judgment against Bornschein was still in force, the judgment

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entry was only for the enforcement of the lien. As we have shown, this was a misconception of the *status* of the case. It follows that the judgment entry in this respect is insufficient and erroneous. We will, therefore, reverse the judgment, and remand the cause with directions to the circuit court to enter a judgment as herein indicated as of date of the last judgment entry, viz., a judgment against Bornschein for $511.84, such judgment to be a lien on the property. Costs of this appeal are taxed against the plaintiff. All the judges concur.

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LOUIS LANGAN, Respondent, v. FREDERICK SCHLIEF, Appellant.

**St. Louis Court of Appeals, November 21, 1893.**

1. **Landlord and Tenant:** SUFFICIENCY OF SERVICE OF NOTICE TO QUIT. When the statute requires notice in writing, as in the case of notice for the termination of a tenancy from month to month, the reading of a written notice to the person to be served does not satisfy the requirement

2. ——: ——. A landlord's notice to quit was addressed to two persons. It was served on one of them by the reading of it to him, and a copy of it was furthermore delivered to him for the other. *Held,* that evidence of these facts warranted a finding of adequate service on the person to whom the copy was thus delivered.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

AFFIRMED.

*D. P. Dyer* for appellant.

*Edmond A. B. Garesche* and *William L. Murfree* for respondent.

ROMBAUER, P. J.—The following facts are admitted by both parties. The premises in controversy are

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owned by one Keane, who first let them for a term expiring May 1, 1892, to one Prill, and after the expiration of that term let them to the plaintiff Langan for a term of ten years, commencing October 1, 1892. Prill prior to the expiration of his term had let the premises to the defendant Schlief, who held over and was recognized by Keane as his tenant. Keane, prior to granting a new term to Langan, endeavored to terminate the tenancy of Schlief by a written notice. Langan subsequently exhibited to Schlief his own lease from Keane, and made written demand from Schlief for possession of the premises. The demand not being complied with, he instituted the present action of unlawful detainer and recovered judgment.

The defendant, who prosecuted this appeal, assigns for error that Keane's notice to quit was never served upon him in writing as the statute requires, and hence there is not sufficient evidence to support the judgment. This is the only error complained of.

Upon the trial the plaintiff offered in evidence the notice and return. "The defendant's counsel objected to it as irrelevant and immaterial to any of the issues in the case." The court overruled the objection and the notice was thereupon read. It begins as follows: "To Hugo Prill and *Fred Schlieff*, greeting. *You and each of you* are hereby notified," and then proceeds to give a notice to quit in apt terms.

The constable's return on the notice is as follows: "Served the within notice in the city of St. Louis, Missouri, this thirty-first day of August, 1892, by reading the same to the within named Fred Schlief, and also by delivering a true copy thereof *to the said Schlief for the within named Hugo Prill*, the said Schlief being at the time of service on the within described premises."

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This was all the evidence touching the service of this notice, and the defendant contends that it has *no tendency to show* that a notice in writing to terminate the tenancy had ever been given to the defendant Schlief. Whether this contention is correct is the point for consideration.

We will concede the proposition contended for by appellant, which is supported by the weight of authority in other states, that, where the law requires notice in writing, the reading of a writing to the person to be notified is no compliance with the requirement. *Hart v. Gray*, 3 Sumner, 339; *Williams v. Brummel*, 4 Ark. 129; *Fitts v. Whitney*, 32 Vt. 589. An intimation to the contrary is contained in *Conway v. Campbell*, 38 Mo. App. 475, but this point did not arise for decision, and the expression was used *obiter* only. We also concede the further proposition contended for, that in unlawful detainer proceedings the plaintiff should be held to the proof of a strict compliance with all antecedent conditions of a right of recovery, because the consequences of his success subject the defendant to high penalties. Yet, conceding these, we must conclude that there was evidence in this case *tending to show* a compliance with the requirement of a notice in writing to the defendant.

The notice which was read to the defendant Schlief was an exact copy of the written notice which, according to the constable's return, was delivered to him. That notice was addressed to both Hugo Prill and Fred Schlief. The defendant Schlief, therefore, knew when the copy was delivered to him that it was a writing addressed to him which he had a right to read. In *School District v. Holmes*, 53 Mo. App. 487, 493, the evidence was that a notice of demand in an unlawful detainer proceeding was taken to the defendant's residence, where, at the defendant's request, a

copy of it was made by his wife, *which was left with her.* We held that this was evidence tending to show a notice in writing. In *Van Studdiford v. Kohn*, 46 Mo. App. 439, we intimated that any manner of service might suffice, when it clearly appears that the written notice in proper form reached the party sought to be affected in time provided by statute. A text writer, frequently quoted, in speaking of this subject says that "any manner of serving the written notice will suffice, when it can be traced to the hands of the party, for whom it was intended, in due time." Wade on Notice, sec. 640. As applied to the facts of this case that statement is not too broad.

We must, therefore, hold that there was evidence tending to show that the requisite notice in writing to terminate the tenancy had been given, and that the defendant's complaint, that there was no evidence in the case which could be submitted to the jury, is not well founded.

We have refrained from placing our decision on the ruling in *Drey v. Doyle*, 99 Mo. 459, 471, although that case certainly furnishes an additional reason for our upholding the judgment in the case at bar. It is evident that the objection made in this case to the constable's return was not more specific than in that case to the notice to quit. We do not wish to be understood as holding that evidence, which has no probative force whatever, can amount to proof of a fact simply because it has not been objected to.

The objection to the notice of demand of possession, namely, that it was a service by copy, is not tenable. Service by copy of such demand is sufficient. Revised Statutes, 1889, section 5124.

All the judges concurring, the judgment is affirmed.

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CHARLES GREEN, Respondent, v. MATHIAS DOUGHERTY *et al.*, Appellants.

**St. Louis Court of Appeals, November 21, 1893.**

1. **Principal and Surety:** DISCHARGE OF LATTER. If the holder of a judgment releases a lien obtained under it on property of the judgment debtor, the sureties on a bond of the latter, given for the payment of the judgment, are thereby discharged to the extent of the value of the property released.

2. **Attachments:** EFFECT OF RECOVERY OF JUDGMENT ON LIEN OF ATTACHMENT. When the plaintiff in a suit by attachment recovers judgment, the lien of the judgment merges that of a levy of the writ of attachment on land, subject to the doctrine of relation in the determination of priorities. Accordingly, the lien of such levy is lost, if the lien of the judgment is allowed to expire by limitation.

3. **Judgments:** LIEN ON LAND. The duration of the lien of a judgment on land of the judgment debtor will not be extended through the recall and stay of execution on motion of such debtor, and the giving of bond, under section 2406 of the Revised Statutes of 1879, for him.

*Appeal from the Circuit Court of the City of St. Louis.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*Valle Reyburn* for appellants.

*G. A. Finkelnburg* for respondent.

(1) The attachment upon the real estate was merged into the judgment rendered in the case February 16, 1888. After the rendition of the judgment the lien theretofore existing under the attachment ceased, and the lien of the judgment began to run. Drake on Attachment, sec. 224*a*; Waples on Attachment, p. 583. It follows that, when the present plain-

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tiff bought the property from McKenna (March 21, 1889), he bought it subject to a judgment lien, and this judgment lien expired at the end of three years from the day the judgment was rendered; that is to say, it expired on the fifteenth day of February, 1891. Revised Statutes, 1889, sec. 6012. The lien of an attachment does revive on the expiration of the judgment lien. Drake on Attachment, sec. 224*a*; *Bagley v. Ward*, 37 Cal. 121. (2) The fact that the plaintiff in the attachment could not enforce his lien, owing to the stay of the execution, will not serve to extend his lien. *Christy v. Flanagan*, 87 Mo. 670; *Chouteau v. Nuckolls*, 20 Mo. 442. A judgment lien is purely statutory, and cannot be extended beyond the term prescribed. *Christy v. Flanagan*, 87 Mo. 670, 672; *Warner v. Veitch*, 2 Mo. App. 459.

Biggs, J.—This action is brought by the plaintiff as assignee to enforce the obligation arising out of an alleged breach of the following bond:

"Know all men by these presents, that we, John Finn, for James McKenna, as principal, and we Joseph P. Whyte and M. Dougherty, as sureties, of the city of St. Louis and state of Missouri, are held and firmly bound unto James Harrigan, of the city of St. Louis and state of Missouri, in the sum of four hundred ($400) dollars, to be paid to said James Harrigan, his executors, administrators or assigns, to the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated the twenty-fifth day of May, A. D. 1888.

"The condition of this obligation is, that, whereas the circuit court, city of St. Louis, upon the application of James McKenna has stayed the execution for one hundred and forty-six (146) dollars in favor

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of said James Harrigan, and levied upon real estate of said McKenna in said city. Now, if the said application of said McKenna be finally determined against him and he will pay the debt, damages and costs, to be recovered by said execution, or render in execution all his property liable to be seized and taken or sold by such writ, or if the said sureties will do it for him, then this obligation shall be void; otherwise it shall remain in full force and effect.

"JOHN FINN, [SEAL.]
"JOS. P. WHYTE, [SEAL.]
"M. DOUGHERTY, [SEAL.]

"Signed sealed and delivered in presence of
"PHILLIP H. ZEPP, Clerk.

(Indorsed on the back.)

"For value received I hereby assign all my right, title and interest, in and also the within bond, this twenty-eighth day of May, 1891, to Charles Green.

"JAMES HARRIGAN.

"Witness,
"WM. E. GARVIN."

The answer contained a general denial, and as a special defense it was averred that on the twenty-eighth day of May, 1891, the plaintiff herein paid to Harrigan the full amount of the judgment and costs in the attachment proceeding, and that, instead of entering satisfaction of the judgment as he ought to have done, Harrigan wrongfully and unlawfully assigned the judgment to the plaintiff. The case was tried by the court sitting as a jury, resulting in a judgment for plaintiff in the sum of three hundred dollars. No exceptions were saved as to the evidence, and no instructions were given on behalf of either plaintiff or defendants. The only point saved is the refusal of the circuit court to give an instruction of nonsuit.

The leading or essential facts, being chiefly established by the records and proceedings in the attach-

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ment suit mentioned in the bond, are not the subject of controversy. We gather the following facts from the documentary proof. On the eighth day of December, 1887, Harrigan commenced his attachment suit against McKenna and Finn, which action was based on a promissory note alleged to have been executed by McKenna to Finn, and by Finn indorsed to Harrigan. At the time this suit was begun McKenna was a nonresident, and he was the owner of certain real estate in the city of St. Louis. This property was levied on under the writ of attachment against him. Finn was personally served, and McKenna was brought in by publication. On the sixteenth day of February, 1888, the suit was dismissed as to the defendant Finn, and a default and final special judgment entered as to McKenna for $146. On the twenty-fourth of May following McKenna, acting presumably under sections 457 and 458 of the Revised Statutes of 1879, which were then in force, filed a petition to set aside and vacate the judgment rendered against him, and setting up a defense to the note. A special execution having been previously issued on the judgment, McKenna on the same day filed a motion to recall it. It was ordered to be recalled on condition that a bond be given. (Section 2406, of Revised Statutes of 1879.) In pursuance of this order the bond in suit was filed and approved, and on the twenty-fifth day of May, 1888, an unconditional order was entered recalling the execution. On the eighth day of October, 1888, a motion was filed to vacate the order recalling the execution, and on the twenty-third day of November the latter motion was sustained by consent of parties; but before this latter order was entered, to-wit, on November 22, 1888, McKenna instituted a new and independent suit to vacate the judgment. This last suit was not brought to trial

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until November 13, 1890, when upon a hearing of the evidence the plaintiff was nonsuited. A motion to set aside the nonsuit was overruled on December 17, 1890. On the third day of April, 1891, by the consent of parties the following judgment was entered in said cause: "Now at this day come said parties by their respective attorneys; thereupon, on motion of plaintiff (defendants consenting), it is ordered that defendants' petition filed herein on May 24, 1888, be dismissed, the plaintiff's special judgment herein, of date February 16, 1888, stand absolute, and that plaintiff have a general judgment in his favor and against defendants for $146, with interest at the rate of eight per cent. from February 16, 1888, and his costs herein, and have execution therefor." (Section 460 of the Revised Statutes of 1879.) On the ninth day of April, 1891, a special execution was issued under this last judgment, and on May 5, 1891, the real estate originally attached was levied upon and advertised to be sold on the twenty-eighth day of May, 1891. The foregoing is the record evidence pertaining to the controversy, concerning which there is no dispute.

In addition the plaintiff's evidence tended to prove that in the year, 1889, he, for a consideration of $3,500, purchased from McKenna the real estate mentioned, and had received from him a good and sufficient deed therefor, dated February 7, 1889, and recorded March, 25, 1889; that, when the plaintiff was notified of the levy under the last execution, he purchased the judgment from Harrigan, which together with the bond sued on was for a valuable consideration assigned to him by Harrigan, and that he thereupon stopped the sale and instituted the present action.

The conditions of the bond are that McKenna either pay the judgment and costs, or render in execution all of his property liable to be seized and taken or

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sold under the execution. While it is not claimed by the defendants that McKenna has paid the debt, it is insisted that he rendered in execution his property which was liable to seizure and sale under the execution, and which was of much greater value than the amount of the judgment, and that by order of the plaintiff, who claimed to have purchased the judgment, the property was released from the levy, thereby relieving the defendants from all liability on the bond.

The equity principle is well established and recognized in this state that, if a judgment creditor releases a lien he may have secured by levy on the property of the judgment debtor, the sureties of the latter are discharged to the extent of the value of the property so released. *Lower v. Bank*, 78 Mo. 67. Applying this rule to the facts, the question presents itself, whether the real estate in the hands of the plaintiff was liable for the payment of the judgment? If not, then the defendants were in no way prejudiced by the action of the plaintiff in stopping the sale.

It is undoubtedly true that the plaintiff bought the property subject to the lien of the original judgment against McKenna, but that lien expired by limitation on the sixteenth day of February, 1891. That was the only lien against the property. The attachment lien, which was merely conditional or hypothetical, was merged in that of the judgment (Drake on Attachments [7 Ed.], section 224*a;* Waples on Attachment, p. 583); and it did not revive on the expiration of the judgment lien. Drake on Attachments, section 224*a*. *Bagley v. Ward*, 37 Cal. 121. Mr. Drake says, (section 224*a*, *supra*): "The power to levy by virtue of an attachment does not survive the recovery of judgment in the action, and no new right or interest in the property of the defendant can be thereafter acquired under it. And when, in a suit by attachment,

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the plaintiff obtains a judgment which, by the existing law, is a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment. If the plaintiff neglect, within the lawful period of his judgment lien, to subject the property to execution, the lien of the attachment does not revive on the expiration of the judgment lien."

It logically follows that, at the time McKenna's petition to vacate was dismissed (April 5, 1891) and the original judgment made absolute, the plaintiff held the property free from all liens. It is no answer to say that the lien against the real estate could not have been enforced earlier. The bond could not extend the lien of the judgment beyond the statutory period. It has been so held in the case of an appeal, where a *supersedeas* bond has been given. *Christy v. Flanagan*, 87 Mo. 670; *Chouteau v. Nuckolls*, 20 Mo. 442.

The other evidence tended to show that the plaintiff is the legal owner of the judgment, and that he held the bond by a valid assignment. Under the views expressed the breaches of the bond are obvious. McKenna did not pay the judgment, and did not render in execution the real estate owned by him at the time the original judgment was entered; nor could he do so, since he had sold it to the plaintiff and the judgment lien thereon had expired. We will, therefore, affirm the judgment. All the judges concur.

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AUGUSTA STIEPEL, Appellant, v. THE GERMAN AMERICAN MUTUAL LIFE ASSOCIATION, Respondent.

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St. Louis Court of Appeals, November 21, 1893.

1. **Life Insurance:** WAIVER OF FORFEITURE. Waiver differs from estoppel in that it depends solely on the intention of the party against whom it is invoked.

2. ——: ——: SUFFICIENCY OF EVIDENCE. When the failure of the insured does not absolutely avoid his life insurance, but entitles him to a reinstatement of it within one year upon payment of the delinquent dues, a showing of good cause and satisfactory proof of good health, proof that the insurer, after default but within the year, mailed circulars to him advising him of assessments, is not sufficient evidence of a waiver of the forfeiture.

*Appeal from the St. Louis City Circuit Court.*—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

*Rassieur & Schnurmacher* for appellant.

A provision in an insurance policy, that it shall become null and void for nonpayment of premiums, is for the benefit and protection of the company, and may be waived by it. *Hanley v. Life Association of America*, 69 Mo. 383; *Thompson v. Ins. Co.* 52 Mo. 469. While forfeitures, when legally established, will be enforced, they are not favored by the law, and the courts are always ready to seize hold of any circumstances that indicate an election to waive the right of forfeiture. *Hartford, etc. Ins. Co. v. Unsell*, 144 U. S. 439; *Sims v. Ins. Co.* 47 Mo. 54; *Froelich v. Ins. Co.* 47 Mo. 406. The forfeiture of a policy for nonpayment of premiums or assessments will be deemed waived by a subsequent recognition, on the part of the insurer, of

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its continuing force or validity; such as a notice requesting payment of the overdue premium; a notice of liability on a later assessment; and the like. *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410; *Murray v. Home Benefit Ass'n*, 90 Cal. 402; *Robinson v. Ins. Co.*, 18 Hun, 395; *Mut. Life Ins. Co. v. French*, 30 Ohio St. 240; *Roby v. Ins. Co.* 120 N. Y. 510; *Martin v. Equitable Acc. Ass'n*, 41 N. Y. S. 77; *Titus v. Ins. Co.*, 81 N. Y. 410; *Elmer v. Mut. Benefit Life Ass'n*, 47 N. Y. S. 35; *Stylow v. Ins. Co.*, 69 Wis. 224.

*Chester H. Krum* and *Albert Blair* for respondent.

Forfeitures because of nonpayment of premium when due upon life policies are not regarded with the same disfavor as those arising from breaches of other conditions of the insurance. *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Thompson v. Ins. Co.*, 104 U. S. 252. The assured was not led by a course of dealings to believe that he could pay at any time whether he was sick or well. The question presented by the appellant's case is merely whether the assured was restored by the respondent from a condition of voluntary default to one of full rights as a member or policy holder. It was manifest that he was not so restored. *Lantz v. Ins. Co.*, 159 Pa. St. 546; *Marvin v. Ins. Co.*, 85 N. Y. 282. The receipt of premium which is overdue, on condition that assured is in good health, is not a waiver. So the sending of circulars is not a recognition of membership in the sense of a waiver of forfeiture for nonpayment of premiums. The company being a mutual benefit association, it was even its duty to advise a suspended member of condition of the association. *Ronald v. Mut. Reserve*, 132 N. Y. 378; Bacon on Benefit Societies, sec. 432; *Schmidt v. Modern Woodmen*, 54 N. W. Rep. 264. The cases cited by the appellant do not sustain her position.



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ROMBAUER, P. J.—The plaintiff sued to recover $2,000 as beneficiary of a life insurance policy or certificate, issued by the defendant on the life of her husband. The petition states the contract of insurance, death of the assured, and a general compliance with the provisions of the policy, and prays judgment.

The answer sets up a number of defenses, of which, however, for the purpose of deciding the point arising on this appeal, only the following one is material:

"The said defendant admits that on the twenty-second day of August, 1889, said Julius R. Stiepel, on his written application thereto, was admitted as a member of this association, and that, on payment in cash of the first fixed annual premium, to-wit, $6, by said Stiepel, and on his delivery to defendant of his promissory note for the first four quarterly mortuary payments chargeable on his policy, and on his promise thereafter annually, viz., on the twenty-second day of August in each year, to pay the fixed premium of $6, and to pay all quarterly mortuary calls as they should severally become due, said certificate of membership or policy of insurance for $2,000 on the life of said Stiepel, payable to plaintiff, was issued by defendant to said Stiepel.

"Defendant avers that, by the terms and conditions of said policy, and more particularly by special stipulation number three thereof, and by the terms and conditions of said application, which, by the terms of said policy, were made a part thereof, said certificate was issued and received upon condition that, if any of the payments stipulated therein to be made should not be paid when due at the home office of this association, in the city of Burlington, Iowa, or to an authorized agent of the association furnished with a receipt

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by its president or secretary; then, in that case, said certificate should be *null and void, and all payments made thereupon should be forfeited.*

"Defendant avers that Julius R. Stiepel failed to pay, on or before the day it became due, the second annual fixed premium on his said policy, viz:, the sum of $6, which became due and payable on the twenty-second day of August, 1890, although duly notified of the maturity of said premium, and that, thereby, under the special conditions aforesaid said policy became null and void; but defendant avers that, under the provision of section 4, article 12, of the constitution of the association, and which is specially referred to in said application, said section being as follows, viz: "Sec. 4. *Any member lapsing, his certificate may be reinstated in the discretion of the executive committee at any time within one year for good cause shown upon satisfactory proof of good health, and payment of all delinquent dues and assessments;*" there remained to said Stiepel the privilege of being reinstated to membership and to the benefit of his policy, and the payments thereon, by making at any time within one year of said default an application therefor to the executive committee of the company, by supplying satisfactory proof of health and by paying all delinquent dues and assessments.

"Defendant avers that said Stiepel, having made default, as aforesaid, to pay said second annual premium on the twenty-second day of August, 1890, continued in default for a long time, to-wit, the space of ten weeks, and until he received bodily injuries or became affected with disease such as precluded his restoration to membership under the terms of said section 4, and that he at no time after having made said default made an application to be restored upon the terms of said section 4."

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The reply denies the affirmative matter of the answer, and pleads the following by way of waiver of the conditons relied upon by the defendant:

"Further replying to said answer, plaintiff denies that, on the twenty-second day of August, 1890, the said policy became null and void for failure on the part of the said deceased or this plaintiff to make the payment of $6, as in the answer is averred.

"And plaintiff denies that, because of any failure to make payment on said twenty-second day of August, 1890, the defendant undertook to, or did, declare any forfeiture of said policy. That, on the contrary, the defendant recognized the said policy as in full force and effect at, and long after, said twenty-second day of August, 1890, and waived any right on its part to declare a forfeiture of said policy, if any such right ever existed, by notifying the said deceased on or about November 6, 1890, that a duly authorized collector of defendant would call on him in St. Louis for the purpose of receiving payment from him of the said amount, and by notifying him at or about the said sixth day of November, 1890, that he had until December 5, 1890, to make the said payment.

"And, further replying, plaintiff states that, as a matter of fact, the defendant did receive from said deceased on or about November 30, 1890, and long after the time when defendant now alleges that said policy had become void, payment of said sum of $6, also of the annual expenses, dues, and of all other amounts then due upon said policy, and that defendant received and retained said moneys with full knowledge of the physical conditions of the deceased husband of plaintiff at said time."

Upon the trial the plaintiff gave in evidence the certificate of insurance and the indorsements thereon, which contained the clauses relied on by the defendant.

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The plaintiff also gave evidence showing that, when the certificate was issued on August 22, 1889, the defendant accepted from the assured his promissory note, payable on or before December 1, 1889, in payment of his mortuary assessments for one year, and of an admission fee of $6. The plaintiff gave no evidence showing or tending to show that the annual assessment of the assured due August 26, 1890, had been paid. For the purpose of showing a waiver of the forfeiture created by such nonpayment, the plaintiff gave in evidence two circulars issued from the home office of the company, the one having no date and being addressed, "to our members at St. Louis," the other bearing date November 1, 1890, and being addressed to the assured by name. There was no direct evidence that the assured had ever seen these papers, or either of them. The plaintiff testified that she did see them before the death of the assured, on November 12, 1890, and that they were found in the yard where they had been carried by a dog. The first of these papers was as follows:

"HOME OFFICE OF THE GERMAN AMERICAN MUTUAL LIFE ASSOCIATION.

"BURLINGTON, IOWA, ————, 189—.

"*To our Members at St. Louis:*

"In consideration of the large membership at St. Louis, and in order to accommodate such of our members as prefer paying to a collector, we have arranged with our collector to call upon you in due time, but, as our membership in your city is already very large, and is growing very rapidly, the collectors cannot call at every place on the very last day of payment, but will be obliged to start about the twentieth of this month, in order to get through by the first of next month. Therefore, we kindly ask you to hold

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the money in readiness for them from the twentieth of this month on.

"*Caution.* No one is authorized to pay to a collector, except upon a receipt properly signed by the secretary and stamped with the seal of this association. If paid otherwise, you do so at your *own* risk.

"Yours very truly,

"F. H. A. KOCH,

"Secretary."

The second of these papers was in the following words:

"HOME OFFICE OF THE GERMAN AMERICAN MUTUAL LIFE ASSOCIATION.

"BURLINGTON, IOWA, Nov. 1, 1890.

"Enclosed herewith I hand you notice of your last quarterly payment in this year, and, in doing so, I am pleased to assure the members that this association is in a most prosperous condition; our membership is steadily increasing, and our death losses have been comparatively small.

"Thus far we have secured in an average sixty new applications per month, which I consider a very healthy growth in membership. Since organization up to date, this association has never resisted a single claim, but to the contrary has paid every death claim, always promptly and in full, long before due. In this respect our association stands as the peer in the front rank of all associations in the land. That's the kind of a company for you to insure with and to stand by. When you buy your insurance, you don't want to buy a lawsuit in connection with it, but want to buy pure benefit for your beloved ones.

"Since organization we received over twenty-one thousand applications; out of this from four to six hundred have been either rejected, or have lapsed their

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policy, which leaves us still a very nice membership in force.

"We have received in mortuary premiums a total of eighteen thousand and forty-one dollars and forty-seven cents ($18,041.47), out of which we paid for death losses $10,760, leaving a net balance of $7,281.47 still on hand. This is an excellent showing, of which any member may justly feel proud, and the officers feel thankful for the success thus far attained.

"Thanking you most heartily for your prompt payments in the past, I ask you kindly to be especially prompt this time in making your payments before the fifth day of December, which is the last day of grace, as this payment comes in the last month of the year, and should be paid early so that we may be able to close our books at the proper time.

"A complete statement of the full year's business in detail will be sent to each member after the close of the year.

"Although our success thus far attained has been very gratifying, yet, an encouragement on the part of the members will never come amiss; and nothing is more encouraging to the officers and the agents than to know that all the members take an active part in recommending this association to their friends. This is your association as much as it is anybody's; and, whenever you speak a good word to your friends for this association, you are building up your own interest. How easy may each member secure one new applicant per year, and thus double our membership each year. May I not depend upon your earnest endeavor to induce some one to join this association? We will gladly pay you a liberal commission for each new member that you secure. If you don't know how to go at it, write to us for instruction. A good plan is to make a list of the names of your friends, then make it an

object to speak to them at your earliest convenience about our plan of insurance and, etc., etc., and, if you find him favorably impressed, then send us his address and other particulars concerning his view of insurance, etc. Then we will attend to the rest, and, if he be induced in this way to become a member, we will pay you liberally for your trouble.

"Hoping that I may have the pleasure of hearing from you further upon this subject at an early date, I am very truly yours,

"F. H. A. KOCH,
"Secretary."

The assured died on the thirtieth day of November, 1890. The day preceding his death his attorney sent a postoffice order to the secretary of the company for a sum sufficient to cover the note of the assured given to the company and mortuary assessments, but taking no notice of the annual expense dues which were payable August 22, 1890, amounting to $6. The secretary replied calling attention to the fact that this assessment was overdue for three months, and that he could not accept it unless a satisfactory certificate of health was furnished. He enclosed blanks for that purpose, stating that they must be filled and returned before the certificate could be put in full force. Before this reply reached the attorney, the assured had died.

This being all the evidence offered by the plaintiff, the court instructed the jury that she could not recover; whereupon she took a nonsuit, and, after an ineffectual attempt to vacate the same, she appealed.

It will be thus seen that the only question presented for our consideration is whether the acts of the defendant in this case were of a character to furnish evidence of a waiver of forfeiture of the policy,

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which by the express terms of the contract occurred upon the nonpayment of the dues of August 22, 1890.

*Waiver* depends solely upon the intention of the party against whom it is invoked, and is in that respect essentially different from *estoppel.* Hence we attach no importance to the fact that the evidence fails to show that the two circulars issued by the defendant, and above set out, were seen by the assured or read by him. If the evidence adduced clearly tends to show an intention on the part of the defendant to waive the forfeiture, it is immaterial for the purpose of establishing a waiver whether such intention was communicated to the assured or not. On the other hand it is equally immaterial, in determining the question of waiver, whether the assured believed that the defendant intended to waive the forfeiture, if it cannot be reasonable inferred from its acts that such was its intention. While it is said that the question of waiver is ordinarily a question for the jury, this simply means that the sufficiency of the evidence is a question for them. Whether there is any evidence of a given fact must always remain a question of law for the court.

Keeping the above distinction in view, we must conclude there was no evidence of a waiver in this case, the sufficiency of which the court could have submitted to the jury. Notwithstanding the default of the payment in the August installment, the assured still remained *sub modo* a member of the defendant company. He might by the terms of the contract, upon satisfactory proof of good health, have been reinstated at any time within one year after such default. Section 4, above set out, recognizes that he is a member of the company, notwithstanding such lapse. There is, therefore, no inconsistency in the action of the company in addressing to him circulars as a member, and yet claiming that he had ceased to be an unconditional member.

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In that respect this case is essentially different from the cases cited by the appellant, all of which are cases which lack this element. In *Chicago Life Insurance Co. v. Warner*, 80 Ill. 410, the premium fell due on June 28; the assured failed to pay it and died the next day. Thereafter the company wrote to him under date of July 2: "The premium on your policy, * * * *fell due* June 28. * * * If you wish *to continue this policy in force*, you will please remit the above amount to this office by return mail." This clearly indicated an intention on part of the company to waive the forfeiture, *and continue* the policy upon a subsequent payment of the premium. In *Murray v. Home Benefit Life Ass'n*, 90 Cal. 402, the company solicited the payment of overdue assessments, and gave notice of a subsequent assessment; the policy contained no condition of a reinstatement on terms, and none were annexed to the solicitation. In *Robinson v. Pacific Fire Ins. Co.*, 18 Hun, 395, overdue premiums were demanded by the company from the *executors*, and it was held that such demand waived a forfeiture of the policy, which the company might have claimed on the ground that the death of the assured worked a change in the title. In *Insurance Co. v. French*, 30 Ohio St. 240, the agent of the company took a check and note in payment of the premium, adding to the note that its nonpayment should work a forfeiture of the policy. The policy itself had no such condition. The court held there was no forfeiture. The question of waiver did not arise in this case. In *Elmer v. Mutual Benefit Life Ass'n*, 47 N. Y. St. Rep. 35, the assessment was payable on October 15, and the assured died on October 1. The court held that a recovery could not be defeated by failure to pay an assessment payable after the death of the assured. In *Stylow v. Ins. Co.*, 69 Wis. 224, the policy was similar to the one in the case at bar, providing for

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a restoration only on payment of arrears and a certificate of health. It appeared in evidence, however, that the company had collected sixty-three consecutive assessments, all at a time when they were overdue without requiring in any instance a certificate of health. This was held such a course of conduct as to estop the company from insisting on a forfeiture for nonpayment of premium on the exact day. The case is one of estoppel and not of waiver. On the other hand in *Schmidt v. Modern Woodmen*, 54 N. W. Rep. 264, it was held on a policy containing *the clause of reinstatement on terms* that a member in default could not claim a waiver and reinstatement *without terms*, although he was called upon to pay a subsequent assessment by a letter specially directed to him. So it was held in *Ronald v. Mutual Reserve Ass'n*, 132 N. Y. 378, that the fact of furnishing blanks to a defaulting member's representatives, and giving them directions how to fill them out, was a mere act of courtesy, and in no way a waiver of a forfeiture which the company claimed.

As the member in the case at bar remained a conditional member notwithstanding his default, the sending of circulars of the company to him, which simply advised him of accruing assessments within the year when his conditional right of reinstatement still existed, and of the methods provided by the company for the collection of such assessments, is no evidence of a waiver of a forfeiture of unconditional membership.

The judgment is affirmed. All the judges concur.

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## SOL. V. RICH, Respondent, v. LEON FENDLER, Appellant.

St. Louis Court of Appeals, November 21, 1893.

1. **Master and Servant:** PROOF OF INCOMPETENCY OF LATTER. A servant, employed in a stated capacity for a fixed term on condition that he was competent therefor, was dismissed by the master after he had been engaged for a month in the discharge of his duties but during the term of the employment. The master sought to justify the dismissal by proof of the servants incompetency. *Held*, that evidence of the servant's general reputation as a workman, and of his failure to give satisfaction in other like employment, was not admissible for this purpose.

2. **Practice, Appellate:** WEIGHING THE EVIDENCE IN ACTIONS AT LAW. When the solution of an issue of fact in an action at law depends upon the credibility of witnesses whose testimony is conflicting, this court will not review the verdict of the jury thereon on the ground that it is opposed to the weight of the evidence.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

AFFIRMED.

*Collins & Jamison* for appellant.

(1) A master who hires a servant for a definite period of time on the faith of the latter's representations as to his capacity in that line of employment may terminate the contract before the expiration of the time, if such representations are untrue. *Anstee v. Ober*, 26 Mo. App. 665; 14 American & English Encyclopedia of Law, 790; *Squire v. Wright*, 1 Mo. App. 172; Wood on Master and Servant [2 Ed.], 166. Under the contract sued upon the defendant had the right to show that the plaintiff did not have the qualifications to discharge the duties of said position, and

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was not competent to fill said position; and the court erred in excluding the testimony offered on this point. (2) Where the preponderance of evidence is so excessive as to show that the trial court abused its discretionary power in allowing the verdict to stand, the verdict will be set aside by the appellate court. *Schulte v. Railroad*, 5 Mo. App. 578; *Garrett v. Greenwell*, 92 Mo. 125; *Spohn v. Railroad*, 87 Mo. 74; *Whitesett v. Ransom*, 79 Mo. 258; *Ackery v. Staehlin*, 56 Mo. 561; *Hipsley v. Railroad*, 88 Mo. 353.

*Charles L. Hamm* for respondent.

(1) This court will not review the weight of the evidence. *Gary v. Cole*, 38 Ill. 236; *Lalor v. McDonald's Adm'r*, 44 Mo. App. 439; *Pohlman v. Tilden*, 44 Mo. App. 569. (2) The court properly excluded evidence as to the competency and skillfulness of plaintiff. The question was not whether he was capable of performing the duties devolving upon him under the contract, but whether he did perform them, and the jury found that he did. 7 American and English Encyclopedia of Law, p. 500, and cases there cited; *Stevenson v. Gelsthorpe*, 27 Pac. Rep. 404.

BIGGS, J.—This was an action for damages for an alleged violation of the following contract:

"ST. LOUIS, August 17, 1892.

"This is to certify that I hereby engage Mr. Sol. V. Rich, for the term of three months from this day up to the seventeenth day of November, 1892, at a salary of $20 per week, provided he is competent to fill the position he is engaged for,—that is, as foreman in the manufacturing department.

"(Signed) L. FENDLER."

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It is alleged that under the foregoing contract the plaintiff entered the service of the defendant, and that he continued to faithfully discharge the duties of the position assigned to him until the tenth day of September, 1892, when the defendant without cause discharged him from the employment; that afterwards the plaintiff sought other employment, but was unable to obtain it. The defense was that plaintiff was careless in the discharge of his duties; that he was incompetent to fill the position; and that, when his attention was called to his dereliction of duty, it was mutually agreed that the contract between the parties should be rescinded. There was a verdict for the plaintiff, and the defendant has appealed.

On the trial the plaintiff read the contract in evidence, and he introduced other evidence tending to prove his alleged cause of action. The evidence of the defendant tended to prove that the plaintiff was careless and negligent in the discharge of the duties assigned to him, and that, when his attention was called to his failure to properly do the work assigned to him, he declared his willingness and intention to quit work, to which the defendant assented. The defendant offered to prove by other witnesses, who were acquainted with the plaintiff, that he did not possess the necessary skill to discharge the duties of foreman of such a business as the defendant conducted, by showing his general reputation as a workman, and that he had undertaken similar work for other parties and had failed to give satisfaction. The court excluded this evidence, and the defendant assigns that for error.

We are of the opinion that the court did right in excluding the evidence which the defendant offered. The plaintiff worked for the defendant for more than a month, and we think that his competency or incom-

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petency could be best determined by the manner in which he *actually discharged* the duties assigned to him. The question at issue was whether the plaintiff did his work honestly, promptly and properly. In determining this it certainly would not have been relevant for the plaintiff to show that he was a mechanic of good reputation, or that he had discharged similar duties for some one else in a satisfactory manner. Neither was it competent for the defendant to show the contrary of this. In actions against physicians for malpractice it has been held that evidence of the general reputation of the physician was irrelevant; that the unskilfulness of the physician must be determined by the manner in which he treated the particular case, and that his general reputation, whether good or bad, could cut no figure. *Stevenson v. Gelsthorpe*, 27 Pac. Rep. 404. So, in this case, it could make no difference whether the plaintiff's general reputation as a workman was good or bad, or whether he had failed to perform similar duties for other parties in an unskillful manner.

The other assignment is that the trial court abused its discretionary powers in allowing the verdict to stand, as the preponderance of the evidence for the defendant is such as to indicate bias in the verdict. The substance of such an assignment is that under all the evidence the unavoidable inference is that the verdict was the result of passion, prejudice or mistake, and that, therefore, the trial court, in overruling the motion for a new trial, abused its judicial discretion. We have held that the verdict of a jury must be regarded as the result of a mistake or prejudice, when it is against all reasonable probabilities in the case. In the present action the testimony of the defendant on the main question was opposed by the testimony of the plaintiff, that is, as to the manner in which the

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plaintiff discharged the duties assigned to him. While the plaintiff's testimony stood alone, and that of the defendant was measurably corroborated by other witnesses, yet the issue was such that it is impossible for us to say that the testimony of the plaintiff could not in reason be true. The solution of the question had to be determined by the credibility of the witnesses and the weight of the evidence. Of the former the jurors were the sole judges; and whether the conclusion reached by them was against the weight of the evidence was for the trial court to decide, and we can not review its action.

All the judges concurring, the judgment will be affirmed.

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J. D. MARSHALL LIVERY COMPANY, Appellant, v. JAMES McKELVY, Respondent.

**St. Louis Court of Appeals, November 21, 1893.**

1. **Burden of Proof:** INSTRUCTIONS. The burden of proof is not affected by evidence of facts which establish a *prima facie* case. It remains the same throughout the case; and, notwithstanding such *prima facie* case, the jury may accordingly be instructed that it is on the party who has it at the outset.

2. **Negligence in Overdriving:** EXPERT EVIDENCE. The plaintiff sued herein for the death of a horse, alleged to have been caused by overdriving. He sought to establish this allegation by the opinion of an expert, and with that purpose put to the expert a hypothetical case, which substantially covered the facts shown in evidence, with the exception of the speed at which the horse was driven. *Held*, that this omission rendered the hypothetical case objectionable.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

AFFIRMED.

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*Collins & Jamison* for appellant.

(1) It is a well established proposition of law that, when personal property has been delivered by one party to another in good condition, and the same is damaged while in the possession of the latter, the burden is on the bailee of showing that he treated the property in a proper manner while in his possession, and that the loss or damage to it was not due to his negligence. The burden of proving such negligence is not upon the bailor. *Taussig v. Schields*, 26 Mo. App. 327; *Arnot v. Branconier*, 14 Mo. App. 431; *Weiser v. Chessley*, 53 Mo. 547; *Collins v. Bennett*, 46 N. Y. 490; Edwards on Bailment, sec. 62; *Beardsley v. Richardson*, 11 Wend. 25; *McNabb v. Lockhart*, 18 Ga. 495. (2) The lower court also erred in rejecting the expert evidence offered by plaintiff, to the effect that the horse died from excessive driving.

*J. R. Myers* for respondent.

BIGGS, J.—The plaintiff hired to the defendant a horse and buggy. It was alleged that, at the time the horse was delivered to the defendant, it was in a healthy condition, and that the defendant "negligently treated the horse, and drove the same to such an unusual and excessive extent, that said horse died from the effects thereof," etc.

The plaintiff's evidence tended to show that the horse was delivered to the defendant at about 1:30 P. M.; that, at the time, the animal was apparently in good condition; that it died about 9:30 P. M.; and that, when it was first seen by the plaintiff's witnesses, which was about half an hour before its death, it was sweating profusely.

The defendant's evidence tended to prove that the horse was driven at a moderate pace, not exceeding six



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or seven miles an hour; that it was rested and watered several times during the afternoon, and that the animal was at no time overheated. Under the instructions, the jury found the issues for the defendant, and the plaintiff has appealed.

At the instance of the defendant the court instructed the jury as follows: "The court instructs the jury that the *burden of proof* is on the plaintiff to establish to their (the jury's) satisfaction by *preponderance of proof* that defendant failed to exercise ordinary care in driving and caring for the horse while in his charge; and, secondly, that said failure to exercise such care caused the death of the mare sued for; and, unless the jury are satisfied from the evidence of both such facts, the verdict must be for the defendant."

The plaintiff complains of this instruction. It is insisted by counsel that plaintiff made a *prima facie* case, when it offered evidence tending to prove that it delivered the animal to the defendant in an apparently healthy condition, and that the burden was then cast upon the defendant to show by a *preponderance of evidence* that he was free from negligence in the use of the horse. This objection loses sight of the distinction between the burden of proof and the burden of evidence. The former remains throughout the trial where the pleadings place it in the first instance, while the latter may shift from side to side according to the state of the proof. *Long v. Long*, 44 Mo. App. 141; *Heinemann v. Heard*, 62 N. Y. 448; *Central Bridge Corporation v. Butler*, 2 Gray (Mass.) 132; *Scott v. Wood*, 81 Cal. 400; *Willett v. Rich*, 142 Mass. 356; *Powers v. Silberstein*, 108 N. Y. 171; *Wilder v. Cowles*, 100 Mass. 487. It was necessary for the plaintiff to allege and prove that in the use of the horse the defendant was guilty of some negligent act, and that the death of the horse was the result of such act. These were the con-

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stitutive facts of the cause of action. A *prima facie* case was made by the introduction of evidence tending to prove that the horse, at the time of the delivery to the defendant, was apparently in good condition. If the evidence had closed at this point, the plaintiff would have been entitled to recover, provided the jurors were satisfied from its evidence that the horse was in a healthy condition at the time of its delivery to defendant. Therefore, at this stage of the proceeding, the *burden of evidence* was cast on the defendant to show by some substantial evidence that he exercised ordinary care in the use of the animal. When this burden was met, then the final question for the jury was whether the whole evidence *preponderated* in favor of the plaintiff as to the constitutive facts of its cause of action, *i. e.*, that the defendant was negligent in the use of the horse, and that such negligence was the proximate cause of its death. The burden of proving these issues by a preponderance of evidence was imposed on the plaintiff by the pleadings, and we can conceive of no principle, recognized in our code of civil procedure, that would relieve the plaintiff of this *onus*.

In the case of *Heinemann v. Heard*, *supra*, it was said: "It was error to refuse to charge that the burden of proving negligence was upon the plaintiffs. * * * The charge against the defendants was, that they did not exercise proper care and diligence in the business of their agency. This was denied, and whether they did or not was the question to be decided. Upon this question the plaintiffs held the affirmative throughout the trial, and their relation to the question never changed. During the progress of a trial, it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it *prima facie*, and it is sometimes said the burden of proof is then shifted. All that is meant by this is, that there is a necessity of evidence to answer the *prima facie* case, or

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it will prevail, but the burden of maintaining the affirmative of the issues involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial."

In the case of *Central Bridge Corporation v. Butler, supra*, the court makes use of this language: "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established."

In the case of *Scott v. Wood, supra*, the court, in discussing the distinction between the burden of meeting a *prima facie* case and the burden of producing a preponderance of evidence, said: "The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains upon the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue."

As a further illustration of the principle which we contend for, the supreme court of Massachusetts, in the case of *Perley v. Perley*, 144 Mass. 107, said: "While the burden of proof in an action upon a promissory note, as between the original parties, is upon the promisee to establish the fact that it was given for a valuable consideration, the production of the note and proof of the defendant's signature establish a *prima facie* case which entitles the plaintiff to a verdict. But the burden of proving a consideration still remains upon the plaintiff, notwithstanding this presumption, and, if there is any evidence in the case on this point on behalf of the defendant, the plaintiff must show, by a prepon-

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derance of the whole evidence, that the note was given for a valuable consideration."

It is useless to quote further from the cases. We are clearly of the opinion that the instruction is free from the objection urged against it. What was said by this court and the supreme court (*Taussig v. Schields*, 26 Mo. App. 327; *Arnot v. Branconier*, 14 Mo. App. 431; *Wiser v. Chesley*, 53 Mo. 547) concerning the burden of proof did not refer to the burden of producing a preponderance of evidence, which must in every case rest on the party holding the affirmative of the issue.

The allegations of negligence were that the plaintiff "so negligently *treated* said horse, and drove the same to such an unusual and excessive extent," etc. In the defendant's instructions the jury were told that the verdict must be for him, unless he failed to use ordinary care in *driving and caring* for the horse. It is insisted that the instructions confined the jury to the consideration of the alleged act of overdriving. There is nothing in this objection. The language of the instructions is broad enough to embrace any act of negligence concerning the horse. Besides, there was no evidence tending to prove any act of negligence, other than unusual or excessive driving.

In rebuttal the plaintiff introduced as a witness Dr. James, a veterinary surgeon, for the purpose of eliciting his opinion of the cause of the death of the horse. Plaintiff's counsel stated to the witness a hypothetical case, which covered substantially the facts as shown by the evidence, except the rate of speed at which the horse was driven. The defendant objected to the sufficiency of the question for the above reason. The court declined to allow the witness to answer. As heretofore stated, the plaintiff's evidence, if it proved anything, tended to show a case of unusual and excessive driving, hence it was necessary to an intelligent opinion

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by the expert that the rate of speed should be stated. Plaintiff's counsel having failed to supply the omission, the court did right in refusing to allow the witness to testify.

There are some other matters presented in the brief which we do not deem it necessary to discuss, as the result would not be changed. We will, therefore, affirm the judgment. All the judges concur.

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W. A. GILL, Respondent, v. CHARLES S. REED, Appellant.

St. Louis Court of Appeals, November 21, 1893.

**Statute of Frauds:** PROMISE TO PAY FOR GOODS SOLD TO ANOTHER PERSON: INSTRUCTIONS. To show that a promise to pay for goods sold and delivered to a third party was original and not within the statute of frauds, it is essential, if the purchase was not a joint one, that the credit for the goods should have been given solely to the promisor. And, *held*, that an instruction which submitted such an issue in this cause was not sufficiently definite and clear.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

*Henry B. Davis* for appellant.

*Dodge & Mulvihill* for respondent.

BOND, J.—This is an action upon an account for $490 for the sale of jewelry. The defendant's answer was a general denial and a plea of the statute of frauds. There was conflict in the evidence as to the transaction out of which the account arose. The plaintiff stated that the defendant and one Orth came to his place of business October 31, 1892, and that said Orth picked

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out two pairs of diamond earrings, one diamond bracelet and one emerald ring (articles set out in the account sued on) to take home to show to his wife; that the plaintiff thereupon took the defendant in his back room and said to him that, if he wanted to take the goods, it was all right, but that Orth could not take them, and that defendant replied several times: "Ain't I good enough for them," to which plaintiff answered: "Certainly, you can have two or three times that amount, and you know it;" that the goods, after being cleaned, were sent by the plaintiff's store boy to Mr. Orth's number, which the defendant gave. The plaintiff admitted that he was to allow one-half ($45) of the profit of this sale to the defendant.

The defendant denied all of the foregoing statements as to the delivery or sale of the goods upon his credit, and stated that he had no other connection with the matter than to introduce the buyer, Mr. Orth, to the plaintiff in pursuance of an agreement with the plaintiff, whereby the defendant was to receive one-half of the profits on all sales to persons brought by him to the plaintiff's store. The defendant's statements were corroborated substantially by the only other witness and by the attendant circumstances. There was evidence of an entry on plaintiff's books in the handwriting of one of his clerks, headed as follows: "Mr. Charles Reed, per Joseph Orth, No. 417, N. 4th street, Oct. 31st," then giving the articles and price of each. There was also evidence that the plaintiff's partner subsequently furnished the defendant the following statement from the plaintiff's books:

"St. Louis, Nov. 12, 1892.

"*Mr. Joseph Orth,*

"No. 417 N. 4th street.

"Bought of W. A. Gill, watches, diamonds, jewelry, etc., 616 Olive street," then mentioning the articles and prices sued for.

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The testimony disclosed that Orth absconded, and, the bill being unpaid, plaintiff sued the defendant therefor. Upon the trial the jury returned a verdict for the plaintiff.

The only errors complained of on this appeal by the defendant are; *first*, that the judgment for plaintiff is unsustained by the evidence; *second*, that the court erred in the instruction given for plaintiff.

The instruction complained of is as follows, to-wit:

"The court instructs the jury that, if they believe from the evidence that the goods, wares and merchandise mentioned in evidence were sold *or delivered* to Mr. Orth upon the request of the defendant, and on his (defendant's) account, on or about the thirty-first day of October, 1892, and that the said goods, wares and merchandise, were charged to the defendant; and that the plaintiff looked to the defendant for the payment for same; if you find such to be the fact from the evidence, then the jury will find for the plaintiff for $445, with interest at the rate of six per cent. from the second day of November, 1892."

In order to show that a promise to pay for goods sold and delivered to another is original and not within the statute of frauds, it is essential that the promisor should have been a joint purchaser of the goods, or that the credit for their sale should have been given solely to him. One or the other of these elements is indispensable to an original promise. *Rottman v. Fix*, 25 Mo. App. 571. It is also elementary that a delivery does not *per se* import a sale. In the above instruction the jury were told that, if the goods "were sold *or* delivered" to Mr. Orth upon credit given the defendant, they might find against him. This was a fatal error under the evidence. The weight of the evidence tended to show that the articles sued for were merely delivered to Orth to be taken home and shown to his

wife, who was expected to make a selection from them for future purchase; that at the time of this delivery the defendant, when questioned about it, said: "Ain't I good enough," and that, about ten days thereafter, when told that a bill had been rendered Mr. Orth for the goods, the defendant then said: "I will pay you on the fifteenth for those goods." It is evident that this view of the evidence would not support an action for the *sale* of the goods to defendant upon his *sole* credit or as a joint purchaser, and yet by the use of the disjunctive "or" instead of the copulative "and" in the above instruction the jury might have been misled into a finding against defendant on insufficient evidence. It is, in fact, questionable whether the evidence adduced had any tendency to show a consummated sale to any one.

The instruction is also objectionable in not setting forth with sufficient clearness that the credit must have been extended solely to the defendant upon the hypothesis of a sale to him alone, and not as joint purchaser.

For these reasons the judgment herein is reversed and the cause remanded. All the judges concur.

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GONA LANCASTER, Appellant, v. HENRY ELLIOT *et al.*, Respondents.

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**St. Louis Court of Appeals, November 21, 1893.**

1. **Divorce:** INTEREST ON PAYMENTS FOR MAINTENANCE. When a decree of divorce adjudges the payment of fixed installments of money from the husband to the wife for the maintenance of their child, each installment bears interest from the time when it is payable.

2. **Discharge of Contract Under Seal:** CONSIDERATION. A contract under seal may be discharged, before or after breach, by parol for valuable consideration; and a legal consideration for an agreement is furnished by the least advantage under it to the promisor or the least detriment to the promisee.

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*Appeal from the St. Louis City Circuit Court.*—HON. JAMES E. WITHROW, Judge.

AFFIRMED.

*Laughlin, Wood & Tansey* for appellant.

There was no consideration for the agreement of October 13, 1885. *Lancaster v. Elliot*, 42 Mo. App. 503.

*E. P. Johnson* for respondents.

The agreement was fully executed by the parties by acting under it, and it needs no other or further consideration to support it. Bishop on Contracts, sec. 81. Even a partial execution of it was sufficient. *Id.*, sec. 87. Further, the acceptance of benefits under it by plaintiff, and his conduct in acting under it, estop him from denying its validity. Bishop on Contracts, secs. 286, 290; *Boggs v. Olcott*, 40 Ill. 303; *Wiggins v. Railroad*, 73 Mo. 389; *Dean v. Walker*, 107 Ill. 540. A specialty may be discharged for a valuable consideration by a parol agreement, or without other consideration by a parol agreement fully executed; or a parol agreement may be substituted for it, or rights may be waived under it by parol when the respective parol agreements have been fully executed as this one was by acting under it. Bishop on Contracts, secs. 134, 135, 137, 68, 804; *Green v. Wells*, 2 Cal. 584; *Dearborn v. Cross*, 7 Conn. 48; *Dickerson v. Ripley*, 6 Ind. 128; *Lawrence v. Dole*, 11 Vt. 549.

BOND, J.—This is an action upon a bond given in a divorce proceeding between the appellant and the respondent, Ida M. Lancaster. The bond sued on was executed by defendant in due form, to-wit:

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"Know all men by these presents, that we, Ida M. Lancaster, as principal, and Henry Elliot and Henry Elliot, Jr., as sureties, are held and firmly bound unto Gona Lancaster in the sum of $1,000, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals, and dated this sixteenth day of July, 1884.

"The condition of the above obligation is such that, whereas, on the seventeenth day of July, 1884, a decree was rendered in cause numbered 64570 in the circuit court of the city of St. Louis; now, if said Ida M. Lancaster shall hereafter well and truly preserve and perform upon her part said decree in all respects, then this obligation to be void, otherwise of full force and virtue. And the damages to said Gona, by reason of any breach thereof, are agreed to be liquidated and adjusted at the amount of this bond."

The portion of the decree covered by the above bond is as follows, to-wit:

"It is further ordered and adjudged by the court that the defendant pay for the maintenance of Gladys Lancaster, the minor child of said parties, on the first Saturday of each month hereafter to the said plaintiff at the East St. Louis bank, in East St. Louis, Illinois, the sum of $30 a month, the first payment being made this day; and that should said $30 a month, or any part theerof, be diverted from the maintenance of said child at any time hereafter, the said allowance shall cease. It is further ordered by the court that the plaintiff shall have the custody of said child, but that said child shall not be carried to, or kept in, East St. Louis, Illinois, before the first of October, 1884, and that the defendant shall have the right and privilege to visit and see the said child on Tuesday, Thursday and Saturday of each week for the space of two

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hours on each of said days, during the afternoon, at the house of the plaintiff."

The breaches alleged were a refusal by respondent, Ida M. Lancaster, to permit appellant to see their child.

The answer of respondents admitted the bond, denied its breaches, and affirmatively pleaded: *First*, a contract between the appellant, Gona Lancaster, and the respondent, Ida M. Lancaster, to be substituted for the bond sued on in the files of the court, and to be a part of the decree of divorce between the parties thereto; *second*, that by an agreement between said parties entered into October 13, 1885, in reference to said bond "the time and manner in which appellant should see said child, Gladys, and the payment of alimony and allowances provided by said decree and the terms of said bond were entirely superseded, and the same cancelled.

The agreement referred to in these two defenses was as follows, to-wit:

"East St. Louis, October 13, 1885.

"*To Gona Lancaster.*

"I propose that any rights you may have under the decree of the circuit court of the city of St. Louis, state of Missouri, granting me a divorce, be relinquished in the following particulars, viz.: *First*, that the bond of $1,000, given by me for the observance of said decree, be withdrawn from the files of the court and cancelled; *second*, that I shall not be required to write to you, unless the child, Gladys, is in bad health; *third*, that you shall see the child, Gladys, two hours each day, in the afternoon, on three days of each week, Tuesdays, Thursdays, Saturday, enter the front door and go into the reception room in whatever house the said Ida M. Lancaster may live or reside; *fourth*, that

you at once pay all back monthly allowances provided by said decree, and that the said monthly allowances still be continued. This stipulation to be put on file as part of the decree in said cause; and, in consideration thereof, I revoke my right to proceed against you for disregarding the terms of said decree.

"IDA M. LANCASTER.

"Accepted.

"GONA LANCASTER."

This case was tried by the court sitting as a jury, who found for the defendants. By stipulation of parties, the case was submitted upon the evidence contained in transcript numbered 4786 in this court, and a further admission set forth in said stipulation, "that defendant, Ida M. Lancaster, instituted after October, 1885, a suit against plaintiff, Gona Lancaster, for $30 per month for thirty-three months for amount ordered in the decree of divorce in evidence herein to be paid monthly by said Gona to said Ida for support of their child, Gladys, and recovered therein a judgment for the sum of $990 for said thirty-three months; that said Ida did not file a motion for a new trial therein or appeal from said judgment, but that said Gona appealed therefrom, and the judgment was affirmed, and he satisfied the same by payment, and that there was no other consideration for the bond sued on, or the agreement of October 13, 1885, or the letters written by the one to the other, than what may be shown by the evidence and testimony in said transcript numbered 4786."

This case has been before this court upon two prior appeals. When it was here the first time, this court held that the trial court erred in nonsuiting the appellant because of his offering in evidence, under the issues then joined, the paper dated October 13, 1885, signed by himself and the respondent, Ida M. Lan-

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caster. The ground of that holding by this court was that there was no evidence *then* in the record, showing that this paper had been *accepted* as his contract by the appellant. See 28 Mo. App. 86. When this cause was here the second time, the record embraced a correspondence between Gona and Ida M. Lancaster, beginning September 4, 1885, and ending October 13, 1885, which was not in evidence on the first trial of this case. Upon a consideration of this addition to the record, this court held on the second appeal (42 Mo. App. 503, 511), that there was "a complete contract (letter, October 13, 1885, *supra)*, as soon as she (respondent, Ida M. Lancaster), mailed to the plaintiff (appellant) the offer in the shape agreed to by him;" and that, this being the law, the fact that the contract was not under seal would not invalidate it even as a release, provided it was supported by a sufficient consideration. This court thereupon reversed this cause for the exclusion of the evidence of correspondence between the former husband and wife.

The only question left for determination on this appeal is, whether or not under the present record there is undisputed evidence of a sufficient consideration for the contract entered into October 13, 1885, between Gona and Ida Lancaster. For if this question be resolved in the affirmative, the judgment of the trial court, being therefore for the right party, should be affirmed irrespective of the technical correctness of the declarations of law given on the trial. *Walsh v. St. Louis Exposition and Music Hall Ass'n,* 101 Mo. 534. The rule as to the consideration of a contract was laid down by Judge Scott in *Marks v. Bank of Missouri,* 8 Mo. 319: "If the least benefit or advantage be received by the promisor from the promisee or a third person, or if the promisee sustain any, the least, injury or detriment, it will constitute a sufficient consideration

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to render the agreement valid." Affirmed in *City of St. Louis v. Gas Co.*, 70 Mo. 116. "The canceling of a contract, or the relinquishment of rights under it, is a valid consideration for entering into a new one. On this, among other grounds, the substitution of contracts is sustained." Bishop on Contracts, section 68. A contract under seal may be discharged, before or after breach, by parol for a valuable consideration, or rescinded by a parol agreement fully executed. Bishop on Contracts, section 134, *et seq.* "Where a contract is not expressed in precise terms, the facts and circumstances surrounding the subject-matter it contains may be looked to in aid of construction; and the acts of parties to the instrument are entitled to great weight." *Belch v. Miller*, 32 Mo. App. 397.

The conceded facts in this case are that, at the time of the making of the contract between Gona and Ida Lancaster set out in the paper dated October 13, 1885, *supra*, the appellant deposited the exact aggregate two hundred and ten dollars of the principal sums (excluding interest) of the monthly allowances ($30 each), which he was required to pay his former wife, to her credit at East St. Louis. It is also admitted that after his withdrawal of this sum, when Ida Lancaster sued him for all allowances then due her, she confined her suit to, and recovered, the exact amount ($990) which was due for thirty-three months at the rate of $30 per month. This was a binding construction by the *accordant act of both parties* to the agreement of October 13, 1885, *supra*, whereby that contract was shown not to have contemplated the payment of interest on the part of Gona Lancaster on the past due allowances to which Ada Lancaster was entitled under the decree of divorce. The suit brought by Jda M. Lancaster was in part execution of her rights under the

new contract, and was strictly limited to its terms, as understood and acted upon by Gona and herself.

It was expressly held, when this case was here before (42 Mo. App. *supra*), that Mrs. Lancaster was entitled in law to recover from Gona Lancaster interest on the past due allowances owing by him at the time of their new contract. The alimony was payable by virtue of a decree rendered in this state, and the rights of the parties under that decree have to be measured by the laws of Missouri. As, under the laws of this state, the right to recover interest on overdue instalments is clear, it is immaterial that there is no evidence in the record as to the laws of Illinois on that subject. Her release to him of this right was a sufficient consideration for their new contract. The result is that the agreement of October 13, 1885, *supra*, is a valid release of any liability of the respondents on the bond in suit, and that the judgment herein in their favor is affirmed. All the judges concur.

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CITY OF ST. LOUIS, Respondent, v. JOHN ROBINSON, Appellant.

St. Louis Court of Appeals, November 21, 1893.

Appellate Jurisdiction: ACTION BY CITY OF ST. LOUIS FOR ENFORCEMENT OF MUNICIPAL ORDINANCE. The supreme court has exclusive appellate jurisdiction of every cause wherein a political subdivision of the state is a substantial party, and, therefore, of an action by the city of St. Louis to recover a penalty or fine for the violation of one of its ordinances.

*Appeal from the St. Louis Court of Criminal Correction.*
HON. J. R. CLAIBORNE, Judge.

TRANSFERRED TO THE SUPREME COURT.

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Biggs, J.—Under the constitutional amendment, establishing and limiting the appellate jurisdiction of this court, the supreme court has exclusive appellate jurisdiction of any cause wherein a political subdivision of the state is a party. The city of St. Louis is a political subdivision of the state, and, as it is the substantial party in the present action, we think that the appeal was improvidently taken to this court. *City of St. Louis v. Bowler*, 94 Mo. 630; *Freeman v. St. Louis Quarry Co.*, 30 Mo. App. 362; *Harman v. City of St. Louis*, *ante*, p. 175. The case of *City of St. Louis v. Bowler*, *supra*, like the present case, was a suit to recover the penalty or fine for the alleged violation of a city ordinance. It was transferred by this court under a general order as required by the last constitutional amendment defining and regulating the jurisdiction of this court. An order will, therefore, be entered transferring this cause to the supreme court, and that the clerk of this court transmit the record with a copy of this order of transfer to the clerk of that court. All the judges concur.

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## Minnie Kennedy, Respondent, v. Obediah Broyles, Appellant.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Forcible Entry and Detainer:** evidence. The evidence in this case for forcible entry and detainer reviewed and found not to support a finding in favor of plaintiff, as it shows defendant was in peaceable possession under plaintiff's husband.

2. **Homestead:** husband and wife: wife's claim. Until the wife's claim of homestead is made, acknowledged and filed for record, the husband's right to convey the title and possession is unaffected.



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3. **Forcible Entry and Detainer:** POSSESSION: HUSBAND AND WIFE. When the husband permitted the defendant to enter under the deed and himself quit the premises with his affects, having already taken his wife away, defendant was in the sole peaceable possession, and a subsequent entry for the plaintiff, the wife, was a trespass.

*Appeal from the Linn Circuit Court.* — HON. G. D. BURGESS, Judge.

REVERSED.

*A. W. Mullins* for appellant.

(1) The complainant, being the wife of Wm. C. Kennedy, had no legal capacity to maintain this action. Her husband owned the legal title and was in the actual possession of the land in his own right, and while such owner and so possessed he sold the land to the defendant, who, under his purchase and in pursuance of his contract, entered upon and took the possession thereof. When William C. Kennedy made the sale and transfer of possession, his wife did not have any possession, or right of possession, separate from and independent of that of her husband. Her rights there were dependent on his rights, and these he had transferred to the defendant. No right of action with respect to the possession of the land remained to her, nor in such case could she sue alone. Therefore, it follows that the demurrer to the complainant's evidence should have been sustained. *Shores v. Shores*, 34 Mo. App. 208. (2) The complainant did not avail herself of the right given her by the statute (2 Revised Statutes, 1889, sec. 5435, p. 1302) to make and file her homestead claim. *Shores v. Shores*, *supra*; *Blandy v. Asher*, 72 Mo. 27. If the said William C. Kennedy had the right to sell and convey his title to the land, he certainly was invested with authority to transfer his possession to defendant, as he agreed and

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contracted to do. And, even if the husband had been precluded by the statute from selling the land, yet he could have rented it or leased it, and thus have transferred the possession to defendant. Thompson on Homesteads, sec. 471.

*E. R. Stephens* for respondent.

Ellison, J.—This is an action of forcible entry and detainer for eighty acres of land. Plaintiff recovered below.

It appears that plaintiff's husband owned the land in dispute, and on the fifteenth of April, 1891, he sold and conveyed it by deed to defendant, defendant paying him in cash and in assumption of a mortgage then on the land. He says that Kennedy "gave him possession," and that he entered next day, the sixteenth, "under his purchase," and begun to repair the fences. That, on April 21, he entered again, he again worked at repairing the fences on the place, and on May 2 he began plowing, Kennedy having in the meantime taken his effects out of the house and left the premises. On the night of May 2 the house was burned. On May 11 plaintiff instituted this action. So far, it is clear enough that defendant was in the actual peaceable possession under his deed from the owner at the time this suit was begun.

But it further appears that on the twentieth of April Kennedy took this plaintiff to her father's home and there left her—abandoned her; and that he removed his personal property from the house and premises that day. That she remained with her father, but left in the house some wearing apparel and a feather bed belonging to her, which was burned in the house. It further appears that plaintiff's father nailed up the gate and procured locks and locked the house for her. It

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further appears that on the third day after Kennedy abandoned plaintiff, on April 23, she notified defendant in writing not to enter the premises. It does not appear whether plaintiff knew that her husband had sold the farm to defendant prior to his taking her to her father's, or that she knew he was intending to leave her there and abandon her.

Our opinion is, that the foregoing facts which are gathered from the undisputed abstract filed with us, fail to support the judgment which was given for plaintiff. The land was a homestead, and as such it would have been subject to a written claim which the wife was authorized to make under the provisions of section 5435, Revised Statutes, 1889, which would have prevented a sale by the husband, and consequent deprivation of her home. But, until such claim is made and filed for record, the husband's right to convey the title and possession is unaffected. *Shores v. Shores*, 34 Mo. App. 208. The language of the statute is: "And any married woman may file her claim to the tract or lot of land occupied by her and her husband, or by her, if abandoned by her husband, as a homestead; said claim shall set forth the tract or lot claimed, that she is the wife of the person in whose name the said tract or lot appears of record, and said claim shall be acknowledged by her before some officer authorized to take proof or acknowledgment of instruments of writing, affecting real estate, and be filed in the recorder's office, and it shall be the duty of the recorder to receive and record the same. After the filing of such claims, duly acknowledged, the husband shall be debarred from, and incapable of, selling, mortgaging or alienating the homestead, in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void; and the filing of any such claim, as aforesaid, with the recorder, shall impart notice to all persons of the con-

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tents thereof, and all subsequent purchasers and mortgagors shall be deemed, in law and equity, to purchase with notice."

The husband having, then, the full legal right to sell and convey the homestead and to deliver the possession, it remains to be seen whether he did so. In the first place, he conveyed it and accepted the purchase money. Defendant says he turned over the possession. He did at least permit defendant to enter the premises on the next day after the sale, for the purpose of repairing, and *did take his wife from the premises and remove his property*, the defendant again entering and working the next day thereafter. There is but one conclusion to be drawn from these facts. It does not affect the legal aspect of the case to grant in plaintiff's favor more than the record shows (it being silent). It may be granted that her husband abandoned her without cause and that he had not told her that he had sold the land and authorized the purchaser to enter. Her husband moved her and himself out and left the premises to defendant under his deed. The moment the husband permitted the defendant to enter under the deed and himself quit the premises with his effects, having already taken his wife away, defendant was in the sole peaceable possession. And when plaintiff's father the next day went upon the premises and locked the doors of the house he was simply entering on defendant's peaceable possession and was no more than any other temporary intruder who should commit trespass. It is clear that defendant has not forcibly entered upon plaintiff's possession, since plaintiff had no possession to enter upon. The demurrer to the evidence interposed by defendant's counsel should have been given. The judgment is reversed. All concur.

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THE STATE OF MISSOURI, Respondent, v. O. P. HUBBELL, Appellant.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Criminal Law:** ARRAIGNMENT. Where there is no arraignment of the defendant, there must be a reversal of the judgment of conviction.

2. **Carrying Weapon:** SELF-DEFENSE. On the evidence in this case the sole issue to be tried is whether defendant was justified in carrying the pistol in his necessary self-defense, and the instructions should be confined to that issue.

*Appeal from the Grundy Circuit Court.*—HON. G. D. BURGESS, Judge.

REVERSED AND REMANDED.

*Geo. Hall* and *Harber & Knight* for appellant.

(1) The court erred in given instruction numbered 1 on the part of the state. Said instruction ignored defendant's theory of the case. *State v. Roberts*, 39 Mo. App. 47. (2) The court erred in refusing to give instructions numbered 3 and 4 on behalf of defendant. *State v. Murray*, 39 Mo. App. 127; *State v. Larkins*, 24 Mo. App. 410. (3) There was no arraignment of defendant in either the justice's court or circuit court, hence this case must be reversed. *State v. Geiger*, 45 Mo. App. 111.

*O. G. Bain* for respondent.

GILL, J.—The defendant was charged, by information filed before a justice of the peace, with carrying, concealed on his person, a pistol, alleged to have been a dangerous and deadly weapon. Being adjudged

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guilty he appealed to the circuit court, where on a trial by jury he was convicted, and now appeals to this court.

I. It appears from the record that defendant was not arraigned nor did he plead to the charge contained in the information. This must be held as fatal to the judgment. Until an arraignment, and plea entered, there was no issue to try.

*State v. Saunders*, 53 Mo. 234; *State v. Montgomery*, 63 Mo. 296; *State v. Geiger*, 45 Mo. App. 112; *State v. West*, 84 Mo. 440.

II. Since this case must be remanded for a new trial we will add that we can see but one real question to be tried by the jury. The evidence, without contradiction, shows that the defendant at the time was carrying a concealed deadly weapon. It was a loaded revolver, and he himself testifies that it was being carried by him for use as a weapon. The accused then was apparently violating the statute prohibiting the carrying of concealed weapons. Section 3502, Revised Statutes, 1889. The only question is, was he justified in carrying the pistol under the provisions of section 3503, which states that "it shall be a good defense to the charge of carrying such weapon, if the defendant shall show that * * * he had good reasons to carry the same in the necessary defense of his person, home, or property." There was some evidence tending to establish such defense, and which, too, the court properly submitted to the jury under instruction number 1, given at defendant's instance. The one instruction given for the state; together with defendant's number 1 was all the law that seems to have been required. Under the evidence shown in the record defendant's number 2 should have been refused.

Judgment reversed and cause remanded. All concur.

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THE WM. W. KENDALL BOOT AND SHOE COMPANY, Defendant in Error, v. JESSE F. BAIN *et al.*, Plaintiffs in Error.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Lease:** LIEN ON GOODS FOR RENT. An unacknowledged and unrecorded lease, providing for a lien on the goods in the building as a security for the rent, will create no lien on such goods against third parties, even having knowledge of it.

2. **Appellate, Practice:** EVIDENCE: EXCEPTIONS. Objections to the admissions of evidence cannot be noticed on appeal unless exceptions are saved.

*Appeal from the Mercer Circuit Court.*—HON. G. D. BURGESS, Judge.

AFFIRMED.

*Harber & Knight* for plaintiffs in error.

(1) As the goods had not been removed from the demised premises they were subject to the payment of the rents. Taylor on Landlord and Tenant [5 Ed.], secs. 558, 583; *O'Hara v. Jones*, 46 Ill. 288. (2) According to the covenants in the lease, defendant's measure of damages is the full amount of the unpaid rent for the full term of the lease, otherwise the measure of damages is the difference between the rent defendant Hall was to receive under the lease, and the rents actually received from the subsequent tenants, and necessary changes in order to re-rent. *Respine v. Porta*, 26 Pac. Rep. (89 Cal. 464) 967; *Ledoux v. Jones*, 20 La. Ann. 540; *Bloomer v. Merrill*, 29 How. Pr. 259; *Randall v. Thompson*, 1 Texas, App. 1102; *Aver v. Penn*, 44 Am. Rep. (99 Pa. St. 370) 114; Gear on

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on Landlord and Tenant, secs. 128, 176; Field on Damages, 523; *Buck v. Lewis*, 46 Mo. App. 227; *Bowen v. Clark*, 29 Am. S. Rep. 625 and note. (3) The lease read in evidence between defendant Hall and J. W. Campion, created a valid lien or mortgage on all the property in the storeroom, and plaintiff, having notice thereof, took subject to this lien, although not recorded. *McCafferty v. Wooden*, 22 Am. Rep. 644 and note; *Hadden v. Knickerbocker*, 22 Am. Rep. 80; *Perkins v. Gibson*, 24 Am. Rep. 644; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Fejavary v. Broesch*, 35 Am. Rep. 261; *Wright v. Bircher*, 5 Mo. App. 322; *Atteway v. Hoskinson*, 37 Mo. App. 132; *Pennock et al. v. Coe*, 23 How. Pr. 177; *United States v. Railroad*, 12 Wall. 362; *Butt v. Ellett*, 19 Wall. 544; *Everman v. Babb*, 24 Am. Rep. 682.

*Karnes, Holmes & Krauthoff* for defendant in error.

(1) The lease from Hall to Campion did not create a valid lien or mortgage on the property in the storeroom. It was neither acknowledged or recorded, and Campion retained the possession of the goods. It is therefore void at law as against a purchaser from Campion in possession, even though the purchaser knew of the existence of the lease. *Heywood v. Waring*, 4 Camp. 291, 295; *Rawlings v. Bean*, 80 Mo. 614; *Sweet v. Pyn*, 1 East. 4; *Hughes v. Menefee*, 29 Mo. App. 192, 203; *Moreau v. Detchemendy*, 18 Mo. 522; Revised Statutes, 1889, sec. 5176; 1 Jones on Liens, sec. 544; *Houx v. County of Bates*, 61 Mo. 391, 393. (2) The evidence is conclusive that plaintiff was in possession of property at the time of the levy, and hence the judgment awarding it the possession thereof should be affirmed. Where the verdict of the jury is so manifestly for the

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right party the judgment will not be reversed. Revised Statutes, 1889, sec. 2303; *Fitzgerald v. Barker*, 96 Mo. 661; *Bushey v. Glenn*, 107 Mo. 331, 334.

Ellison, J.—Plaintiff brought an action of replevin against defendants in which they claimed the property in, and right of possession to, a lot of merchandise. The defendant, Bain, is the sheriff and claimed to hold the property, under a writ of attachment sued out by defendant Hall. There was a verdict for defendant Hall, finding that he had an interest in the property to the amount of $45, and he appeals to this court. The case was here on another occasion and will be found in 46 Mo. App. 581.

It seems that one Campion was indebted to plaintiffs, who are wholesale dealers, for the purchase price of merchandise (mostly that now in controversy), that he was unable to pay them and that they sent their agent with authority to settle the indebtedness by taking in payment thereof the merchandise in question. This agent and Campion agreed that Campion would turn the goods over to plaintiff's agent for them and did so. They had invoiced and boxed them up and had carried all, or the greater part of them, into the rear room of the retail establishment where they were kept, when the sheriff levied the attachment aforesaid.

The attachment suit was founded on a claim against Campion for rent of the building; Campion having leased the building of defendant Hall for a term of years, the term being not nearly expired at the time of the attachment. This lease provided that defendant Hall should have a lien on the goods which might be in the building from time to time for the rent reserved. It was not acknowledged or recorded though there was evidence tending to show that plaintiff's agent knew of it and of its provisions.

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There was evidence tending to show that Campion turned the goods over to plaintiff's agent with the understanding that plaintiff was to pay defendant Hall the rent then due, amounting to $45.

Defendant Hall's claim is that he was not only entitled to the rents already due when the goods were sold to plaintiff, but to the rents which would thereafter become due under the lease. He claims that he had a lien on the goods by reason of the provision in the lease to that effect.. The trial court refused to adopt that theory and instructed the jury, at the instance of plaintiff, that if they found for defendants they could only find the amount of rent due at the time of the commencement of the suit.

It is very clear that the lease being neither acknowledged or recorded created no lien on the goods, even against those who had knowledge of it. This phase of defendant's case is so fully covered by our decision in *Hughes v. Menefee*, 29 Mo. App. 192, that the reasons therein stated need not be again set down here. There is no doubt that whatever assumption of rent there was by plaintiff, was of rent then due, and indeed it might be well argued that this was but the *personal obligation* of plaintiff to pay that amount of the rent as an indebtedness of plaintiff, and in no way attaching itself to this property. This, however, is not in the case, and is not decided, as plaintiff is not complaining. Defendant Hall having no lien on the property as against this plaintiff cannot effect this plaintiff in its claim as purchaser. He cannot charge the property as against them whatever he might do as against Campion himself. We entertain no doubt as to the correctness of the view taken by the trial court of this part of defendant's case.

Defendants objected to certain testimony being admitted by the trial court. The record fails to show

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that he saved any exceptions to the ruling, and we cannot therefore notice the complaint. *Sawyers v. Drake*, 34 Mo. App. 472.

The instructions given for plaintiff are in harmony with what was determined by this court when the case was here on the former appeal. The judgment will be affirmed. All concur.

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MARY M. ANDERSON, Appellant, v. ROBERT S. ANDERSON, Respondent.

**Kansas City Court of Appeals, December 4, 1893.**

1. Divorce: ALIMONY: CONSTRUCTIVE SERVICE. An action to dissolve the marriage relation is a *quasi* suit *in rem*, the marriage *status* being the *res;* and on constructive service and nonappearance of the defendant the most that can be done is to abrogate the marriage relation to the relief of plaintiff; but there can be no personal judgment for alimony against the defendant.

2. ——: ——: ——: MOLLIFYING JUDGMENT: PROCESS. When there has on constructive service only been a decree of divorce entered, without any judgment of alimony, whether at a subsequent term, the court can modify such decree by making an allowance for alimony, *quære*. *Held*, however, that to such supplementary proceeding the defendant must be brought in by regular process, or enter his appearance.

3. Trial, Practice: WAVIER OF PROCESS: DEPOSITION. The mere presence of defendant at the time and place of plaintiff's taking of depositions, without any participation therein, will not amount to a waiver of service of process, though notice of their taking was given to defendant.

4. Injunction: DISSOLUTION: ATTORNEYS' FEES AS DAMAGES. Reasonable attorneys' fee for procuring the dissolution of an injunction are rightly considered in the assessment of damages on plaintiff's bond, yet, the amount to be allowed therefor is limited to fees paid the attorney for procuring the dissolution and do not include fees paid for defending the entire case; and where the injunction is, as in this case, only incidental to the main contention and is dissolved by the judgment on the main controversy, counsel fees for the dissolution are not recoverable in an action on the bond.

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*Appeal from the Nodaway Circuit Court.*—Hon. Cyrus A. Anthony, Judge.

Affirmed in part; reversed in part.

*Chas. H. Anderson* for appellant.

(1) The court erred in sustaining defendant's motion to set aside the order for temporary alimony, and in not making plaintiff an allowance to cover costs herein. As to the alimony *pendente lite* the plaintiff is entitled to such an allowance without regard to the result of the main suit. The court grants this allowance on a *prima facie* case made out. *Harriot v. Railroad*, 8 Abbott's Pr. 284; *State ex rel. v. Seddon*, 93 Mo. 520; *Walker v. Pritchard et al.*, 135 Ill. 103; *Blair v. Reading et al.*, 99 Ill. 615; *Noble v. Arnold*, 23 Ohio St. 264; *Riddle v. Cheadle*, 25 Ohio St. 278; *Langworthy v. McKelvey*, 25 Iowa, 48. (2) In this supplemental proceeding, in which personal service is had on the defendant within the jurisdiction of the court, the jurisdiction of the court is extended to the same limit it would have acquired had personal service been had on the defendant in the original divorce case. In support of this position we cite the case of an attachment against a nonresident of the state, where service has been by publication and no appearance. The application must be an incident to the divorce case. *Doyle v. Doyle*, 26 Mo. 545. We have made it such. The application is properly made by a motion in the divorce case. *Chester v. Chester*, 17 Mo. App. 657; *Covell v. Covell*, 2 Prob. & Div. Law Rep. 411; *Bankston v. Bankston*, 27 Miss. 692; *Wilde v. Wilde*, 36 Iowa, 319; *Lyons v. Lyons*, 21 Conn. 185. An order for alimony can only be made by the court having jurisdiction of the divorce case. *Bennett v. Southard*,

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35 Cal. 688; *Bowman v. Worthington*, 24 Ark. 522; *Turner v. Turner*, 44 Ala. 437; *Fischli v. Fischlie*, 1 Blackf. 360; *Chester v. Chester*, *supra*. In this respect we have complied with the requirements. Reasonable notice is required by statute, which is usually five days. We have given twelve days notice of application to be made. Revised Statutes, 1889, section 5493. As to the service of notice being sufficient in a summary proceeding we cite the following cases: *George v. Middough*, 62 Mo. 549; Wade on Law of Notice, sec. 1142; Wade on Law of Notice, sec. 1187, citing; *Gorham v. Luckett*, 6 B. Mon. 146; *Jenkins v. State*, 33 Miss. 382; Wade on Law of Notice, sec. 1190. Putting all other service aside, the fact of the defendant having entered his appearance at the taking of the depositions, and acknowledging that he would consent and agree to anything that the deponent said, is sufficient to give this court jurisdiction of the person of the defendant, and thus give the court complete jurisdiction to grant alimony. *Bates v. Scott Bros.*, 26 Mo. App. 428; *Berry v. Trust Co.*, 75 Mo. 433. Entry of appearance once made cannot be retracted. *Cooley et al. v. Lawrence*, 5 Duer, 605. Appearance to a cause is presumptively equivalent to process and service. *Page v. Railroad*, 61 Mo. 79; *Eldred v. Black*, 17 Wall. 552; *Borum v. Reed*, 73 Mo. 461; *Kritzer v. Smith*, 21 Mo. 296; *Jones v. Hart*, 60 Mo. 351; *Tuller v. Beck*, 15 N. E. Rep. (N. Y.) 396; Revised Statutes, 1889, sec. 533; *Donnell v. Byron*, 80 Mo. 332; Revised Statutes, 1889, sec. 4505; *Schmidt v. Schmidt*, 26 Mo. 235; *Moster v. Moster*, 53 Mo. 326. (3) Below will be found the leading cases in England and the United States in reference both to independent applications for alimony or maintenance, and applications incidental to divorce or separation suits. *Covell v. Covell*, 2 Prob. & Div. Law Rep. 411; *Westmeath v. Westmeath*, 3

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Knapp, 42; *Turner v. Turner*, 44 Ala. 437; *Rogers v. Rogers*, 15 B. Monroe (Ky.) 364; *Shotwell v. Shotwell*, 1 Sm. & M. Ch. 51; *Lawson v. Shotwell*, 27 Miss. 630; *Bankston v. Bankston*, 27 Miss. 692; *Verner v. Verner*, 62 Miss. 260; *McFarland v. McFarland*, 64 Miss. 449; 1 S. Rep. 508; *Blythe v. Blythe*, 25 Iowa, 266; *Platner v. Platner*, 23 N. W. Rep. (Iowa, 1885), 764; *Wilde v. Wilde*, 36 Iowa, 319; *McKarracher v. McKarracher*, 3 Yeates (Penn.), 56; *Prescott v. Prescott*, 59 Me. 146; *Gilley v. Gilley*, 79 Me. 292; 9 Atl. Rep. 623; *Richardson v. Wilson*, 8 Yerg. (Tenn.) 67, 1835; *Chester v. Chester, supra; Hooper v. Hooper*, 19 Mo. 355; *Simpson v. Simpson*, 31 Mo. 24; *Daniels v. Daniels*, 9 Colo. 133; 10 Pac. Rep. 657, and cases cited; *Davis v. Davis*, 4 S. W. Rep. 822; *Bowman v. Worthington, supra*; *Galland v. Galland*, 38 Cal. 265; *Wilson v. Wilson*, 45 Cal. 399; *Woods v. Waddle*, 26 Am. Law Reg. 31; *Niles v. Vanderzer*, 14 How. Pr. 547; *Abraham v. Mitchell*, 8 Abbott's Pr. 123.

*William C. Ellison* for respondent.

Gill, J.—In the year 1884, the plaintiff, Mrs. Anderson, begun her suit for a divorce from the defendant, Robert S. Anderson. In the petition defendant was charged with desertion, that he was a nonresident of the state, and constructive service of notice was had by publication. This *ex parte* suit was heard in March, 1885, and the plaintiff was divorced. No alimony was asked and none awarded. Five years thereafter (in June, 1890) plaintiff filed her motion asking the court to allow and decree her suitable alimony and maintenance out of the estate of the defendant. In this application the plaintiff set out the facts as to the original petition and decree of divorce and that she did not ask alimony at that time because the defendant was then

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insolvent, etc.; but went on to state that since that time he had acquired property, of considerable value, from a deceased father. In her application plaintiff stated that the defendant was a spendthrift and of reckless and dissipated habits, and she prayed an order enjoining him from disposing of or encumbering his property until her motion was finally heard, etc.

Several days prior to the filing of her motion, plaintiff made out and served on the defendant at St. Louis a notice in writing of her intention to file said application in the Nodaway court, on the sixteenth day of June, 1890. This notice was directed to R. S. Anderson and signed Mary M. Anderson, per Charles H. Anderson, her attorney. It appears to have been served by a third party, who made oath to such service. On June 16, 1890, the court, in pursuance of the plaintiff's notice, but in the absence of the defendant, heard the motion filed that day by the plaintiff, made an order temporarily restraining the defendant from disposing of his property, allowed plaintiff $500 as alimony *pendente lite*, and ordered the case set for a final hearing on July 2, 1890. This order was on June 24, 1890, served on the defendant. At the following November term the Nodaway court, on motion of defendant, set aside the order for temporary alimony, dissolved the injunction and dismissed plaintiff's petition, all on the ground that the court had no jurisdiction of the person of the defendant. Defendant, in making this motion to dismiss, expressly limited his appearance to the purposes thereof.

From this judgment of the lower court, refusing to entertain plaintiff's application for alimony, an appeal was taken.

I. An action to dissolve the marriage relation is a *quasi* suit *in rem;* the marriage *status* is the *res*. The domicil of the plaintiff locates this *status* so as to give

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jurisdiction to the local court; but the courts are not authorized under our statute law to destroy this marriage *status* until the publication of notice to the defendant; and, when this constructive notice is had, the court may proceed to hear and determine whether or not this marriage relation shall be abolished or continued. On such constructive service of notice, and nonappearance of the defendant, the most that can be done by the court where the cause is pending is, upon a proper showing, to abrogate the marriage relation and relieve the plaintiff of this bond of union. There can be no personal judgment for alimony against the defendant, for he is not in person before the court. It was so settled in this state twenty years ago. *Ellison v. Martin*, 53 Mo. 75; 2 Bishop on Marriages and Divorces, sec. 79. Now, in this case, when in 1885 Mrs. Anderson prosecuted to judgment her action for divoce, she was not, and could not be, awarded the allowance of alimony, because there was not in the presence of the court anything upon which to act—the defendant was not there, the matrimonial *res* only was there.

But here was an effort, in 1890 (five years after the original decree of divorce), to open up the case by a supplemental motion and have alimony adjudged against the defendant. We take it that plaintiff was incited to this supplemental proceeding by a section of our statutory divorce law. That section provides for the allowance of alimony when a divorce shall be adjudged, etc., and then states that "the court, on the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance as may be proper," etc. Revised Statutes, 1889, sec. 4505.

It may be well contended that this power given to the court to subsequently *alter* its decree as to alimony only exists where there was original jurisdiction to



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allow alimony; and that in cases like this, where there was no original judgment as to alimony (and in the nature of things could be none), then there was an absence of authority to *alter or modify* any such decree of allowance. As to this, however, we shall not decide; it is unnecessary in the disposition of this case. It is sufficient now to say that, if the court could not originally enter its decree allowing plaintiff alimony—because the defendant was not personally served with process or did not appear to the action—then manifestly there could be no such order now, unless the defendant in this supplemental proceeding was legally brought into court. Jurisdiction over the person of a defendant can only be acquired in the manner pointed out by law, or by the voluntary appearance of the defendant in court and thereby submitting himself to its jurisdiction. 1 McQuillin on Pleading and Practice, sec. 155; *Huff v. Shepard*, 58 Mo. 246; *Thompson v. Allen*, 86 Mo. 85–88. The like process for bringing in a defendant is required in divorce suits as in other civil actions. Sec. 4501 Revised Statutes, 1889. The process for securing the presence of a defendant in the ordinary civil suit is the suing out of the court a writ of summons which is in effect a command in the name of the state of Missouri on the defendant to appear and answer the plaintiff's complaint. Revised Statutes, 1889, secs. 2013, 2016 and 8950; Constitution of Mo., sec. 38, art. 6.

Now there was no legal process served on the defendant in this proceeding. The plaintiff simply served him with a notice (signed by her attorney) that she would on a certain day file her petition or motion asking an allowance of alimony. This is not the way pointed out by the statute for securing the legal presence of a party defendant in the cause. And as the defendant did not appear before the court he

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was not there, in the legal sense of the term; and any judicial determination as to the matter of alimony against such defendant would have been without authority or legal sanction, null and void.

There was nothing in the matter of depositions taken by the plaintiff, on notice to defendant, that could in any way be construed as an appearance by the defendant. That defendant was present in person at the time and place of the taking of plaintiff's depositions did not commit him to the jurisdiction of the court. He took no part whatever in taking such depositions; made no objections to the evidence; examined or cross-examined no witness, did nothing, said nothing that should in any way be construed in law as an admission that he was subject to the juridiction of the court.

We conclude, then, that, the lower court properly declined to entertain this application for alimony and rightly denied the motion therefor.

II. But we hold the court committed error in the assessment of damages on the injunction bond. From the record it appears that after the court had determined that it would not entertain the application for alimony, for the want of jurisdiction so to do, it proceeded on defendant's motion to, and did, enter a further formal judgment dissolving the auxiliary injunction, and assessed as damages the defendant's counsel fees for the entire cause.

While reasonable attorney's fees for procuring the dissolution of an injunction are rightly considered in the assessment of damages on the plaintiff's bond, yet the amount to be allowed therefor is limited to the fees paid the attorney for procuring the dissolution and do not include fees paid for defending the entire case. The "true test," says a reputable author, "with regard to the allowance of counsel fees as damages would

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seem to be, that if they are necessarily incurred in procuring dissolution of the injunction, when that is the sole relief sought by the action, they may be recovered. But if the injunction is only ancillary to the principal object of the action and the liability for counsel fees is incurred in defending the action generally, the dissolution of the injunction being only incidental to that result, then such fees cannot be recovered. Thus where the principal purpose of the action was to adjudicate a question of title, and an interlocutory injunction was obtained, but no motion was ever made or argued for its dissolution, and the case was finally tried upon its merits upon the question of title and decided in favor of defendants, and the injunction was thereupon dissolved by virtue of the judgment upon the main controversy, it was held that counsel fees for the dissolution could not be recovered in an action on the bond." 2 High on Injunctions [3 Ed.], sec. 1686. See, also, *Walker v. Pritchard*, 135 Ill. 109; *Weaver v. Fries*, 85 Ill. 356; *Noble v. Arnold*, 23 Ohio St. 264; *Langworthy v. McKelvey*, 25 Iowa, 51.

We don't wish to be understood that where there is an ancillary injunction sued out of the main case, there can be no attorneys' fees allowed as damages in the dissolution thereof. But we hold, as was declared in *Behrens v. McKinzie* (23 Iowa), "that while reasonable compensation for legal services in procuring a release of the injunction might be recovered as damages on the bond, but that this would not allow attorneys' fees for defending the entire action, but alone for procuring the dissolution of the writ or releasing the property from its operation; and this is as far as we think the rule should go." This limit as to the allowance of fees has been frequently recognized. In addition to above authorities, see also, *Skrainka v. Oertel*, 14 Mo.

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App. 474–482; *Bohan v. Casey*, 5 Mo. App. 102–111; *Blair v. Reading*, 99 Ill. 615.

Now, the attorney's fees in the case at bar accrued altogether in the litigation of the main controversy, to-wit, whether or not plaintiff was entitled to alimony; and that question being determined adversely to the plaintiff, because of the want of jurisdiction in the court, dismissal necessarily followed, and along with it the injunction fell. A motion to dissolve was unnecessary; the disposition of the main question litigated, *ipso facto*, relieved the defendant of the injunction. The $100 as counsel fees charged as damages against the plaintiff and her sureties we think were improperly allowed.

It results, then, that we affirm the judgment of the lower court wherein alimony was denied the plaintiff, but reverse the same as to said assessment of damages on the injunction bond. The costs of this appeal will be equally divided between the parties. All other costs are adjudged against the plaintiff. All concur.

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FRED HEIM BREWING COMPANY, Appellant, v. JOHN A. HAZEN *et al.*, Respondents. 55 277 / 57 291 / 55 277 / 68 626

**Kansas City Court of Appeals, November 6 and December 4, 1893.**

**Principal and Surety:** ALTERATION OF INSTRUMENT: SEAL: DISCHARGE. Changing a simple contract to a specialty by adding the word "seal" in a scrawl after the names of the obligors is such alteration of the instrument as to discharge the surety. The authorities are discussed and distinguished and the holding reaffirmed on motion for a rehearing.

*Appeal from the Gentry Circuit Court.*—HON. C. H. S. GOODMAN, Judge.

AFFIRMED.

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*Ed. E. Aleshire* for appellant.

(1) The principal question in this case is, whether or not the adding of the word seal to the sureties' signatures is such an alteration of the bond as to avoid it and release the sureties. The evidence in this case is uncontradicted, that the bond was received at Kansas City by the plaintiff and obligee in the identical form in which it was sued upon, and, if the seal was added after the sureties signed, such additions were made by some party other than the obligee. *State to use v. Potter*, 63 Mo. 212; *Brown v. Baker*, 64 Mo. 167; *State v. Wright*, 69 Mo. 152; *State v. Hewett*, 72 Mo. 603; *Wolfe v. Schaeffer*, 74 Mo. 154; *State v. McGonigle*, 101 Mo. 353; *Stillwell v. Potter*, 108 Mo. 352; *Bagott v. State*, 33 Ind. 262; *Martin v. Thomas*, 24 How. 315; *Smith v. United States*, 2 Wall. 219; *Bracken Co. Com. v. Dunn*, 80 Ky. 388; *Medlin v. Platte Co.*, 8 Mo. 235; *Bank v. Frecke*, 75 Mo. 178; *Morrison v. Garth*, 78 Mo. 434; *Lubbering v. Kohlbrecher et al.*, 22 Mo. 596; *Andrews v. Calloway*, 7 S. W. Rep. 449; 1 Greenleaf on Evidence, sec. 566, and cases cited in *Andrews v. Calloway, supra;* 1 Greenleaf on Evidence, secs. 567, 568; Brentz on Suretyship and Guaranty, sec. 356, p. 479; 2 Parsons on Notes and Bills, p. 582; *Truett v. Wainswright*, 4 Gillman (Ill.); *Fullerton v. Sturges*, 4 Ohio St. 529.

*McCullough & Peery* and *W. F. Dalbey* for respondent.

(1) The instrument sued upon in this case is declared in the petition to be a bond, or writing obligatory, executed under the hands and seals of the defendants. In this state no instrument is a bond, nor can it be sued upon as a bond, unless it has

attached to it a seal, or what is the same thing, the word "seal" with a scrawl around it. *State ex rel. v. Thompson*, 49 Mo. 189; *Dairy Co. v. Lauer*, 16 Mo. App. 4; *Corbin v. Cassell*, 48 Mo. App. 626. The evidence is overwhelming and uncontradicted, that when these defendants executed said instrument and delivered it to Nauruth, it had no seal attached to any signature upon it. Therefore, when they parted with the possession of it, it was not a bond or writing under seal; whereas, now it is a bond in due form, importing upon its face a consideration; and it is sued upon as such, and, if it were not in its present form, it could not be offered in evidence under the petition in this cause. (See cases above cited.) Therefore, the alteration of said instrument by the addition of seals to the signatures of the obligors, was a material alteration, and is made material by the form of action brought upon it. When these defendants, who were sureties on said instrument, signed it and delivered it to Nauruth to be sent by mail to the plaintiff, it was as to them a delivery of the instrument. Nauruth, under the evidence, may well be considered the agent of plaintiff to receive said bond. 2 Greenleaf on Evidence, sec. 297; *Ellis v. Railroad*, 40 Mo. App. 170; *Huey v. Huey*, 65 Mo. 689; *Hammerslaugh v. Chattham*, 84 Mo. 13; *Lunt v. Silver*, 5 Mo. App. 186. But the plaintiff, by bringing this suit and declaring on this instrument as a bond executed under seal, has ratified the act of the person, whoever he was, who attached the seals to this instrument. The case is, in all respects, like *Bank v. Umrath*, 42 Mo. App. 525. By suing on the instrument in its altered form, and asserting a right by reason of the alteration, the plaintiff has adopted and ratified the act of the person who altered it. (2) Appellant's counsel, in his brief, assumes that, if the alteration was made without the knowledge or

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consent of the plaintiff, it is no defense. Such is not, and never has been, the law of Missouri. If Gustave Nauruth, while in possession of this instrument, and before delivery to the plaintiff, altered it by attaching a seal to each of the signatures to it without the knowledge or consent of the sureties to the instrument, then it is void as to them, although the plaintiff had no knowledge of the alteration. *Haskell v. Champion*, 30 Mo. 136; *Ivory v. Michael*, 33 Mo. 398; *Trigg v. Taylor*, 27 Mo. 245; *Britton v. Dierker*, 46 Mo. 591; *Evans v. Foreman*, 60 Mo. 450; *Bank v. Dunn*, 62 Mo. 79; *Bank v. Armstrong*, 62 Mo. 59; *Moore v. Hutchinson*, 69 Mo. 430; *Bank v. Fricke*, 75 Mo. 180; *Morrison v. Garth*, 78 Mo. 438; *Presbury v. Campbell*, 33 Mo. 542; *Hord v. Traubman*, 79 Mo. 101; *Bank v. Packing Co.*, 4 Mo. App. 200; *Lunt v. Silver*, 5 Mo. App. 186; *Robinson v. Berryman*, 22 Mo. App. 509; *Moore v. Bank*, 22 Mo. App. 684; *Lammers v. Machine Co.*, 23 Mo. App. 471; *Burnham v. Gasnell*, 47 Mo. App. 639; *Bank v. Myers*, 50 Mo. App. 157; *Bank v. Bosserman*, 52 Mo. App. 269.

GILL, J.—One, Gustave Naurath, was engaged in selling beer at Stanberry, Missouri, and he bought his supplies from the plaintiff brewing company. To secure payment of the bills for beer the brewing company required Naurath to furnish it a bond with satisfactory security, and this he did and delivered it the instrument here sued on, purporting to be a bond in the penal sum of $500, under the hand and seals of said Naurath as principal, and defendants Hazen, Bisson, Connly, Stevens, Burnley and Gennug as sureties. Naurath subsequently defaulted in the matter of the purchases of beer, left the country, and plaintiff thereupon brought this action on the alleged bond to recover the amount of such deficiency. The sureties defend on

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the ground that after they and said Naurath had signed the writing, it was materially altered without their knowledge or consent, by attaching to the names of each and all of the obligors the word "seal," with a scroll around the same. The issue thus made was tried before the court without a jury, and from a judgment in defendant's favor plaintiff appealed.

Disregarding points made by the appellant's counsel as to the court's declaration of law, and admitting some errors and inconsistencies therein, yet, under the undisputed facts of this case, we must hold the judgment to be clearly for the right party, and, therefore, affirm the same. That this instrument, when signed by the principal and his sureties, was not under seal, but was in form only a simple contract, cannot be questioned—the evidence in that regard is all one way. And that the seals were added to each name, and the character of the instrument thereby changed, all without any knowledge or consent of these defending sureties, is also uncontrovertably shown by the evidence. Whether such alteration in the nature of the instrument was made by Naurath, while the same was in his possession, or was made by the plaintiff after delivery to it, can make no difference. In either event such alteration was unauthorized and such as to discharge the sureties. This is the law of this state, as shown by the numerous cases cited in brief of defendants' counsel.

The courts will not tolerate any unauthorized change in the surety's undertaking. As well said by Justice Story: "To the extent, *and in the manner*, and under the circumstances pointed out in the obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration

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of it is made, it is fatal." *Miller v. Stuart*, 9 Wheat. 702; 24 How. (U. S.) 317.

We have here a case where the sureties signed, not a bond but a simple contract in writing as distinguished from a specialty, and this was subsequently, without their assent, express or implied, changed to a bond by adding seals to their respective signatures. This, too, was a *material* alteration. The instrument they signed was not of that dignity as the one sued on; the bond, being under seal, imparted a consideration, while the instrument to which they affixed their signatures did not. As said by Story, the sureties can only be held "*in the manner and by the very terms* pointed out in the obligation." See following decisions in point: *Trigg v. Taylor*, 27 Mo. 245; *Haskell v. Champion*, 30 Mo. 136; *Ivory v. Micheal*, 33 Mo. 398; *Capital Bank v. Armstrong*, 62 Mo. 59; *State v. McGonigal*, 101 Mo. 353, 363.

The case in hand does not belong to the class of which *State to use, etc. v. Potter*, 63 Mo. 212, is a sample, and on which plaintiff's counsel seems to rely. In that case Potter, the surety, was not allowed to defeat the action on the alleged ground that the principal had agreed when he, Potter, signed, to get one Bothrick, also as cosurety, unless it was also shown that the obligee had notice of such an agreement. It was there held that Potter was estopped from making such a defense. Judge SHERWOOD, delivering the opinion of the court, says: "Here the surety * * * had invested the principal with an apparent authority to deliver the bond; and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it that there was any secret agreement which should preclude the acceptance of the bond; and the surety is alone in fault in the matter" for his unwarranted trust in Turley, the principal, etc.

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Neither is this one of those cases where the sureties signed and delivered to the principal an instrument with blanks to be filled, and where it has been held that the parties thus executing the paper thereby authorized the party in whose hands they placed it to fill in such blanks. The instrument which these defendants gave into the hands of Naurath was complete on its face, and there were no spaces left to be filled. They saw proper not to affix their respective seals, but to execute only a simple contract; and there was no authority, expressed or implied, in Naurath to make it a different contract. *Capital Bank v. Armstrong, supra*, p. 67; *Ivory v. Micheal, supra*, p. 400; *Agawan Bank v. Sears*, 4 Gray, 95.

Holding these views on the main questions raised in the record, it becomes unnecessary to discuss others now unimportant.

Judgment affirmed. All concur.

ON MOTION FOR REHEARING.

Since announcing the foregoing opinion, we have been induced—because of a motion for rehearing filed by plaintiff's learned counsel—to give the case a more extended investigation, and after a careful review of numerous authorities, some of which are cited by counsel and many others disclosed by our own research, we yet feel constrained to adhere to the position we have already taken. The defense here, it must be admitted, is rather technical than meritorious. But sureties are entitled to technical defenses; they are favorites of the law. As often declared they will not be held to answer for anything, *or in any manner*, except as they specifically agreed. If sureties enter into an agreement in the nature of a promissory note or mere simple contract in writing, they cannot be

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held on a deed or specialty created through an unauthorized alteration of the instrument they signed.

Plaintiff's counsel again insists that the alteration of a written instrument will not discharge the non-consenting surety unless such change was made after delivery to the obligee or by his knowledge or privity. As applied to this case, it seems to be contended, that if Naurath, the principal, changed the nature of the writing after it had been signed by the sureties, and without their knowledge or consent, then such alteration was no defense unless such change was made after delivery to the brewing company, or was made with its knowledge or consent.

Such is not the law of this state. We find some decisions in other jurisdictions that so hold. These cases so declare on the ground that it is a mere spoliation by a stranger; that, as between the surety obligor and the party to whom the promise is made, the principal is a mere stranger to the contract and for whose alteration or mutilation of the instrument the obligee is not responsible, and that he may recover on the instrument as it stood without change. The strongest case of this character, which we have been able to find, is that of *Fullerton v. Sturgis*, 4 Ohio St. (N. S.) 529. But, as already said, the courts in this state make no such distinction and hold the surety discharged whether the alteration be made by the principal while the paper remains in his hands or by the obligee or payee after delivery. *Britton v. Dierker*, 46 Mo. 591; *Trigg v. Taylor*, 27 Mo. 245; *Ivory v. Micheal*, 33 Mo. 398; *Capital Bank v. Armstrong*, 62 Mo. 59; *Robinson v. Berryman*, 22 Mo. App. 510; 2 Brandt on Suretyship and Guaranty [2 Ed.], sec. 388; Baylies on Sureties and Guarantors, sec. 17, ch. 12; *Morrison v. Garth*, 78 Mo. 434; *State v. McGonigle*, 101 Mo. 353, and *Kingston Bank v. Bosserman*, 52 Mo. App. 269, in no

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way disturb the ruling in the foregoing cases. The exact point we have here was not then before the court. The cases, in so far as the facts agree, are in entire harmony. The most that can be said of the *McGonigle case* is that the court intimated that if the principal in the bond had himself erased the name of one of the sureties and substituted that of another without the knowledge of the obligee (and also without the knowledge or consent of the other sureties), then the sureties should not be discharged. This was not the case in hand, and the remark so made by the learned judge who wrote the opinion may be regarded as mere *dictum*. But, admitting it to be the law (and we have no disposition to question it) and yet we are not shaken in our opinion of the law of this case. When a party signs a writing obligatory as one of a number of sureties for another and gives it into the hands of the principal, such principal, with the paper in charge, is clothed with apparent authority to do all things necessary to complete the instrument and get thereon the necessary sureties; and hence anything that he may do within the apparent limits of his agency may, as between parties equally innocent, be held as binding.

But this does not cover the case at bar. These defendants signed a perfect and completed instrument and gave it into the hands of Naurath the principal. It was not a writing under seal, but the principal or this plaintiff altered the paper so as to make it a sealed instrument. He had authority to present this instrument to the brewing company, and none other. He was not authorized to commit forgery by changing it in form and substance.

What was said in *Bank v. Sears*, 4 Gray, 95 is pertinent here. That was a suit against a surety on a note altered by raising it in amount, and the court says: "The position assumed by the plaintiffs, that the

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sureties, by permitting their principal to take the note to the bank to be discounted, gave confidence to him, and must suffer for his misconduct in altering the note, is untenable. The principle sought to be applied is not applicable to this case. The sureties assume a certain definite obligation, the extent of which is clearly and fully stated in the writing they sign. To that extent they give confidence and credit to the principal, but no further. * * * The party receiving a note gives the confidence and trust to the party from whom he receives it."

"Sureties must be permitted to remain in precisely the situation they have placed themselves." *Smith v. United States*, 2 Wall. 235. See, also, *State v. Craig*, 58 Iowa, 240.

The motion for rehearing is overruled.

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T. J. QUERBACH, Plaintiff in Error, v. P. O. ARNOLD, Defendant in Error.

Kansas City Court of Appeals, December 4, 1893.

**Appellate Practice:** NO CHANGE OF THEORY. The appellant must abide by the case he presents to the trial court, and stand in the appellate court upon the theory he presents below.

*Appeal from the Clinton Circuit Court.*—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

*Wm. Henry* and *J. J. McAnaw* for plaintiff in error.

(1) The contract of sale transfers title when the price was ascertained by invoice. Blackburn on Sales, star, p. 124; Benjamin on Sales, p. 125. (2) Vendor

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lost his lien when he parted with possession. Blackburn on Sales, star, p. 124; Benjamin on Sales, sec. 1182. (3) Reception of goods rescinds the contract, when made in pursuance of such offer on part of vendor.

*Thos. E. Turney* for defendant in error.

(1) In actions at law the finding of facts by the trial judge are as binding upon the appellate court as are the finding of facts by a jury. *Handlan v. McManus*, 100 Mo. 124. It is only claimed that the weight of the testimony shows the sale to have been conditional. This court would not reverse, even if it believed the claim to be well founded. *Walton v. Railroad*, 40 Mo. App. 544; *City of St. Louis v. Lannigan*, 97 Mo. 175. An examination of the testimony will show that the claim is not well founded. (2) A case cannot be tried on one theory below and on an entirely different one in the appellate court. *Capital Band v. Armstrong*, 62 Mo. 59; *Walker v. Owen*, 79 Mo. 563; *Nance v. Metcalf*, 19 Mo. App. 183; *Corn v. City of Cameron*, 19 Mo. App. 573; *Fell v. Mining Co.*, 23 Mo. App. 216. Every declaration of law asked by the plaintiff was given by the trial court. No declaration was asked by the defendant.

Ellison, J.—This an action for money had and received. The answer was a general denial. The trial was without the aid of a jury and the finding of the court was for the defendant.

It appears that plaintiff and defendant were negotiating for the sale of defendant's stock of hardware to plaintiff. That an invoice was made and possession turned over to plaintiff and retail sales carried on by him for several days. That, the invoice amounting to more

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than he expected, he went to Illinois to see if he could raise sufficient money to pay for the stock. He ascertained that he could not and so wrote to defendant. Defendant then took charge of the store. At the beginning of the negotiation for the sale, and before the invoice was fairly begun, plaintiff paid defendant $1,000 on the purchase. It is this sum for which this action was instituted.

The sole question tried by the circuit court, so far as we can gather from the record, was whether the sale was conditional or unconditional. This was the theory upon which plaintiff tried the cause. He asked declarations of law relating solely to such theory. The court gave the declarations but found against him on the facts. Plaintiff now abandons that theory in this court and seeks a reversal of the judgment on other grounds. This he cannot do. Perhaps no question has been more frequently decided by the appellate courts of this state than that the appellant must abide by the case he presents to the trial court, and stand here upon the theory he presents there.

The judgment will be affirmed. All concur.

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## The State of Missouri, Respondent, v. James Plummer, Appellant.

**Kansas City Court of Appeals, November 6, 1893.**

1. **Criminal Proceedings**: FILING INFORMATION. It is enough that the information is lodged with the justice, and the defendant arraigned and tried thereon, and it is then sent up to the circuit court on appeal, although the justice's minutes fail to state its filing and it is not marked filed.

2. ———: JUSTICE OF WHAT COUNTY: EVIDENCE. This record sufficiently shows that the justice before whom the proceeding began and the one before whom it was tried were both justices of the county where the offense occurred; and the evidence sustains the conviction.

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*Appeal from the Clinton Circuit Court.*—Hon. W. S. Herndon, Judge.

Affirmed.

*F. B. Ellis* and *Roland Hughes* for appellant.

(1) The court erred in overruling the defendant's motion to quash the transcript in this cause. There are no file marks on the paper purporting to be an information. The court only acquires jurisdiction by an information being filed. The filing of the information must be noted by the officer whose duty it is to have the custody thereof. If the prosecution is by a private citizen, he can file his affidavit with the proper officer. The prosecuting attorney must then file an information based upon said affidavit. This is the only way the court can get jurisdiction of a defendant in a misdemeanor. (Revised Statutes, 1889, sec. 4329.) The only thing that is shown by the record in this case is that the prosecuting witness filed an affidavit. The transcript nowhere shows that an information was ever filed. If the record does not show the filing of an information, then the court had no jurisdiction. *State v. Kelin*, 79 Mo. 515; *State v. Brisco*, 80 Mo. 643; *Ex parte, Thomas*, 10 Mo. App. 24; *State v. Wonderly*, 17 Mo. App. 598; Revised Statutes, 1889, sec. 4365. (2) The second error complained of by defendant is that the transcript of the justice, Wm. Carr, from whom the change of venue was taken, fails to show that the justice sent the case to any justice of Clinton county, Missouri. The only reference in the transcript is that he sent the cause to Watts of Turney. Can the court take judicial knowledge of Turney being in Clinton, county, Missouri? Record must show that the venue was changed to some justice in another



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township. Revised Statutes, sec. 4344; *State v. Metzer*, 26 Mo. 65; *Ewing v. Donnelly*, 20 Mo. App. 6; *Peddicord v. Railroad*, 85 Mo. 161.

*John A. Cross* for respondent.

(1) The information in this case in legal effect was filed with the justice of the peace, under section 4330, Revised Statutes, 1889, when it was properly signed by the prosecuting attorney and delivered to, or deposited with, the justice of the peace, charging the defendant with a criminal offense. *State v. Clark*, 18 Mo. 432; *State v. Couperhaven*, 39 Mo. 430; *Grubb v. Canes*, 57 Mo. 83; *Baker v. Henry*, 63 Mo. 517; *State v. Gates*, 68 Mo. 22; *State v. Pitts*, 58 Mo. 556; *State v. Gowen*, 7 Eng. Ark. 62. (2) The information being properly signed and lodged with the justice, and though no filing was indorsed thereon by the justice, that fact will not affect the jurisdiction of the court, or the validity of the information. *State v. Clark, supra; State v. Gates, supra*, and cases cited; *State v. Pitts, supra; Olin v. Zeigler*, 46 Mo. App. 193; *Bensley v. Haeberle*, 20 Mo. App. 648; *Thompson v. Marshall*, 50 Mo. App. 145; Revised Statutes, 1889, sec. 4366.

Gill, J.—Defendant was tried, and found guilty, in the court below for disturbing a congregation engaged in religious worship, contrary to section 3785, Revised Statutes, 1889. The prosecution was begun before W. H. Carr, a justice of the peace in Clinton county; a change of venue was awarded to D. P. Watts, another justice, where on trial defendant was found guilty, and thereupon he appealed to the circuit court. A trial there resulted adversely, and the cause is here on defendant's appeal.

I. In the circuit court, defendant unsuccessfully moved the court to quash the information on the

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alleged ground that the justice who tried the cause had no jurisdiction, "because," it is said, "said information nor transcript does not show that any information was ever filed in said court." This action of the trial court is complained of as error.

There is no merit whatever in the contention. The transcript of the justices, along with the papers sent up, show, unequivocally, that an affidavit charging the offense was duly filed with Justice Carr; that a warrant thereon was issued and the defendant brought in; that the prosecuting attorney thereupon lodged with the justice his information, and that a trial was had on this information before Watts, justice of the peace, where the jury found defendant guilty as charged in the information and from a judgment entered in accordance therewith before Justice Watts, defendant appealed to the circuit court.

It is true that in the justice's minutes it is not directly stated that the information was filed, nor is the information marked filed on the back thereof. Still, the information is shown to have been lodged with the justice, the defendant was arraigned, pleaded thereto, was tried thereon and found guilty as therein charged. And this same information was certified up, and deposited in the office of the circuit appellate court. This was enough in such prosecution before a justice of the peace. That the paper, or information, was not marked "filed" by the justice is of no consequence, since the lodgment thereof with the justice was such a filing as will answer the demands of the statute. *Building & Planing Mill Co. v. Huber*, 42 Mo. App. 432.

Nor do we discover any merit in the claim that it does not appear that Watts, to whom the case was sent on change of venue, was a justice of the peace of the same county wherein the proceeding was begun.

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It does appear from the face of the proceedings that Carr and Watts were both justices of the peace in Clinton county. This was sufficient.

In reading this evidence we find it ample to sustain a conviction of the offense charged in the information. The court, therefore, rightly declined to sustain a demurrer to the testimony. Judgment affirmed. All concur.

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THE STATE OF MISSOURI *ex rel.* SAMUEL M. WOOD, Respondent, *v.* BENJAMIN T. MEEK, Appellant.

Kansas City Court of Appeals, December 4, 1893.

**Appellate Jurisdiction**: TITLE TO OFFICE: SCHOOL COMMISSIONER. In an action involving the title to the office of county school commissioner, the supreme court, and not the court of appeals, has appellate jurisdiction.

*Appeal from the DeKalb Circuit Court.*—HON. C. H. S. GOODMAN, Judge.

TRANSFERRED TO SUPREME COURT.

*S. G. Loring* for appellant.

*Frank Costello* and *J. F. Harwood* for respondent.

ELLISON, J.—This proceeding is by writ of *quo warranto*, whereby it is sought to oust defendant from the office of county school commissioner for DeKalb county. The lower court entered judgment of ouster, and defendant appeals.

Among the cases of which the supreme court of Missouri has the exclusive appellate jurisdiction under the provision of article 6, section 12, of the constitution as amended in 1884, are those which involve

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"the title to any office under this state." This provision is of broader significance than that other provision in the same section of the constitution which gives the supreme court jurisdiction of cases where "any state officer is a party." The former provision is said to be "not unlike that of section 6, article 14, which provides that all officers, both civil and military, 'under the authority of this state,' shall take the precribed oath of office." *State ex rel. Blackemore v. Rombauer*, 101 Mo. 502. It has been held that a deputy constable would fall under the designation of an officer "under the authority of this state." *State v. Dierberger*, 90 Mo. 369. It must, therefore, follow that the office of county school commissioner is an office "under this state," and as such, in a case involving the title to such office, this court has no appellate jurisdiction. The case will, therefore, be transferred to the supreme court. All concur.

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CITY OF ST. JOSEPH *ex rel.* WM. E. GIBSON, Respondent, v. GEORGE HAX, Appellant.

**Kansas City Court of Appeals, December 4, 1893.**

**Stipulation:** ABIDING RESULT. It was stipulated that this case should abide the result of F. case appealed to the supreme court, provided that case was determined on its merits. F. case was determined on its merits, though no point was made on a question of interest. *Held*, this case cannot farther be prosecuted on the question of interest, which might have been settled in F. case.

*Appeal from the Buchanan Circuit Court.*—HON. S. P. HOUSTON, Special Judge.

AFFIRMED.

*E. C. Zimmerman* and *S. S. Shull* for appellant.

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*H. K. White* for respondent.

(1) The judgment of the supreme court of Missouri in the *Farrell case* was a judgment upon the merits within the meaning of the stipulation between the parties, and the court did not err in refusing to sustain the motion in arrest. *City of St. Joseph v. Farrell*, 106 Mo. 437; *Railroad v. Stephens*, 36 Mo. 150; *Davis v. Hull*, 90 Mo. 165; *Landis v. Hamilton*, 77 Mo. 554, *loc. cit.* 565; Freeman on Judgments, secs. 260, 263–267, 272; Black on Judgments, secs. 694, 704; *Brown v. Sprague*, 5 Denio, 545; *Galbraith v. Newton*, 40 Mo. App. 401; *Galbraith v. Newton*, 45 Mo. App. 324.

Ellison, J.—This is an action instituted upon a tax bill issued on account of the building of a sewer in the city of St. Joseph. There was a finding for plaintiff including fifteen per cent. interest on the tax bill and judgment to bear that rate. Defendant thereupon filed his motions for a new trial and in arrest of judgment. There had been a cause tried in the lower court in which the plaintiff here was plaintiff against Edward Farrell, defendant, which involved the same questions involved in this cause—the judgment in that cause, as in this, drawing fifteen per cent. That case was pending in the supreme court of this state on appeal by Farrell. It was then stipulated by the parties that the motion for new trial and in arrest in this cause should be continued, the case to abide the result of the *Farrell case* in the supreme court, provided that court determined the case on its merits. That court did afterwards determine the case on its merits and affirmed the judgment, though it seems no point was made as to the rate of interest which the judgment drew. 106 Mo. 437.

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This case then coming on to be disposed of, defendant withdrew his motion for new trial. Plaintiff read the stipulation referred to and the decision of the supreme court aforesaid. The trial court then overruled the motion in arrest and defendant appeals to this court, making the point here that the judgment should not bear fifteen per cent. interest.

From a consideration of the agreement in this cause there can be no doubt but that the *Farrell case*, appealed to the supreme court, and this case were regarded by the parties as involving the same questions and that to save trouble and expense it was agreed that the final disposition of this case on the motions for new trial and in the arrest of judgment should be continued over, not to be called up until after the decision of the *Farrell case.* The judgment in that case involved the very matter in dispute in this case and the agreement that this case should abide the result of that case was properly acted upon by the trial court. To permit questions to be raised now which might have been presented in the other case, but were not, would be to violate the evident intention and meaning of the stipulation. A stipulation would be of slight moment if all that was necessary to avoid it would be to call into requisition the ingenuity of counsel to raise some new question. There is no reason apparent to us why defendant should be relieved of his stipulation. See *Galbreath v. Rodgers*, 30 Mo. App. 401; *Ib.* 45 Mo. App. 324.

The judgment below will, therefore, be affirmed. All concur.

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CHARLES H. SEAMAN, Appellant, v. HARRY J. PADDOCK, Respondent.

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**Kansas City Court of Appeals, December 4, 1893.**

Bond: BREACH: RENDERING IMPOSSIBLE TO PERFORM: DAMAGES. **The principle that a party to a contract may break it by rendering the performance of its condition impossible, is applied to a recognizance given on a temporary stay of execution, and it is *held*, that where the principal in such obligation suffered the property seized under such execution to be subsequently sold under an execution enforcing a prior lien, thereby rendering it impossible to turn out the property to satisfy the execution upon the dissolution of the stay order, he suffered a breach of his bond, and he and his sureties would be compelled to perform the other alternative of their obligation, to-wit, pay the debt and costs to be recovered by the execution, and even if it was impossible to render said property in execution at the time the recognizance was entered into, still it remained for them to pay the debt and costs; and in this case the terms of the contract fixed the measure of damages.**

*Appeal from the Buchanan Circuit Court.*—HON. A. M. WOODSON, Judge.

REVERSED AND REMANDED.

*Hall & Pike* for appellant.

(1) Defendants' bond bound them to pay the execution debt, or render in execution all the property of Paddock seized or liable to seizure under the execution. Revised Statutes, sec. 4968. They stand in Paddock's shoes. *McFall v. Dempsey*, 43 Mo. App. 374; *Mill Dam Foundry v. Hovey*, 21 Pick. 443; 3 American and English Encyclopedia of Law, 900, 903, 907, and notes. (2) Performance of the second condition has become impossible without the fault of the obligee, and defendant's liability to perform the first condition is absolute.

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*Jacquinet v. Boutron*, 19 La. Ann. 30; *Brown v. Ins Co.*, 1 C. & E. 853. (3) The property was not "rendered in execution" by seizing and selling it under an execution in favor of another party whose lien was not filed and suit brought when plaintiff's sale was stayed. See *proviso*, Revised Statutes, 6727. The lien for which sale was made was not on same footing. *State ex rel. v. Drew*, 43 Mo. App. 368. (4) Before breach, defendants had the election to perform either condition; after breach, their right of election was gone, and the obligee was entitled to payment in money. *Marlor v. Railroad*, 21 Fed. Rep. 385, and citations; 6 Encyclopedia of Law, 251; *Corbin v. Fairbanks*, 56 Vt. 538; *Waggoner v. Cox*, 40 Ohio St. 539; *Collins v. Whigham*, 58 Ala. 438; Coke Litt. 145*a*. See, especially, *M'Nitt v. Clark*, 7 Johns. (N. Y.) 465.

*J. M. Johnson* and *Vories & Vories* for respondent.

(1) The liens of Seaman and the lumber company both being for material used in the construction of the same improvement are upon an equal footing without reference to the date of filing lien, and either would be entitled to a *pro rata* share of the proceeds of sale under either lien. Revised Statutes, 1889, sec. 6727; *State ex rel. v. Drew*, 43 Mo. App. 362-368. (2) Paddock having no other property than that which the liens of Seaman and the lumber company were against, rendering that property in execution under either of said liens was a full compliance with the bond. Revised Statutes, 1889, sec. 4968; Revised Statutes, 1889, sec. 6727; *State ex rel. v. Drew*, *supra*. (3) There being no charge in appellant's petition alleging unfair conduct at the sale or in procuring the sale, the amount for which the property sold is its value, and evidence offered to prove unfairness in the sale is properly excluded.

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SMITH, P. J.—This was a suit on a penal bond, Revised Statutes, section 4968. It appears from the record before us that the plaintiff recovered a judgment against defendant Paddock for $191.80 debt, and $19.45 costs, which were declared to be a lien and special charge upon a certain frame building and structure known as "Kensington Rink," situate on a certain piece of ground in St. Joseph. It was not against the ground. The purpose of the action was to enforce plaintiff's claim for a lien for work and labor and materials furnished in improving said rink building. A transcript of said proceedings and judgment, duly certified by the justice, was filed in the office of the clerk of the circuit court of Buchanan, on the fifth day of September, 1891; that, later on, an execution was issued on said transcript judgment and placed in the hands of the sheriff, who levied the same on the said rink building; still later on the defendant, Paddock, in vacation filed a motion to quash said execution and presented the same to one of the judges of said court to whom it appeared that said execution ought to be stayed, and thereupon the defendant, Paddock, with the other two defendants as his sureties, entered into a recognizance in the sum of $500, conditioned as required by said section 4968. The order staying the execution with the motion and recognizance was duly certified to the circuit court to be heard in term. Afterwards the motion was by the court sustained, and from the judgment thereon an appeal was prosecuted here, 51 Mo. App. 465, when that judgment was reversed on December 5, 1892.

It further appears that on August 3, 1891, the Dougherty & Moss Lumber Company filed a mechanics' lien for $1,320 in the office of the circuit clerk of Buchanan county against said rink building and the leasehold interest of the defendant, Paddock, in the lands

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on which the same was situated; that afterwards a suit was instituted in said circuit court to foreclose said mechanics' lien, in which judgment was rendered on the twenty-fourth day of November, 1891, declaring said sum to be a lien against said rink building and the leasehold interest of the defendant, Paddock, in the lot on which it was situate; that afterwards, on the eleventh day of February, 1892, the sheriff, under an execution issued to him under said last named judgment, sold said rink building and the said leasehold interest to the defendant, Moss, for $100.

It nowhere appears what the precise term of Paddock's lease was, or how long it had to run at the time the plaintiff's execution was stayed, nor is anything shown in respect to the value of such unexpired lease. The statements of counsel contained in their respective briefs differ as to whether the execution of the lumber company was levied upon the leasehold estate or not, and as the appealing plaintiff has only filed a certified copy of the record entry of the judgment appealed from, showing the time, month and year upon which the same was rendered with the order granting the appeal as authorized by section 2253, we are unable to determine the disputed fact.

The case was submitted to a jury whose finding was for the plaintiff for $4.76, upon the theory of an instruction given for defendants—the only one given in the case—to the effect that, under the pleadings and evidence in this case, the plaintiff is entitled to recover the proportion of the amount of the sum realized from the sale of the building in evidence under the Dougherty & Moss Lumber Company's execution, to-wit, $100, that plaintiff's judgment, to-wit, $191.85, bears to the total sum of plaintiff's judgment, added to the amount of judgments in favor of Dougherty & Moss Lumber Company of $1,320, after deducting from said sum of

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$100 the total amount of costs in the case of *Seaman v. Paddock*, to-wit, $19.75, and the costs in said *Dougherty & Moss Lumber Company v. Paddock case*, amounting to $45.95, and on said sum you will allow interest at six per cent. per annum from February 11, 1892, to date. Judgment went according to the verdict and from which plaintiff has appealed.

By the terms of the recognizance it was expressly provided that if the application of Paddock to stay the plaintiff's execution should be finally determined against him, that he would pay the plaintiff's debt, and costs to be recovered by such execution or render in execution all his property liable to be seized and sold by such execution, or that his sureties, the other defendants, would do it for him.

It is conceded all around that neither defendant Paddock or the other defendants, his sureties, have performed either of the alternative conditions of their recognizance. There is *prima facie* a breach of the conditions of the recognizance. And the question presented for decision is whether performance has been excused. If it has been, defendants are not liable; if it has not, they are.

The mechanics' lien on which there was a judgment of foreclosure obtained by the lumber company, was not only against the rink building, but also against the leasehold interest of Paddock in the ground on which the rink building was situated, and was prior in time to that acquired by the plaintiff by the filing of his justice's transcript judgment. The former was superior to the latter. A sale under the former passed the interest of Paddock in the leasehold. At the time Paddock applied for, and obtained, a stay of plaintiff's execution, he had an interest in the leasehold. This was subject to sale under plaintiff's execution. It may, or may not, have been of great value. The plaintiff, but

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for the act of Paddock in procuring a wrongful stay of the execution, could have subjected the latter's leasehold interest to the satisfaction of his debt by sale under the execution.

But the defendants contend that the leasehold was sold by the sheriff under the execution of the lumber company which was no act of theirs, and for which they are in no way responsible. It is true, perhaps, that the act of the sheriff in selling the leasehold put it out of the power of defendants, or either of them, to thereafter render the same in execution. But it must be borne in mind that the act of the sheriff in selling said leasehold under the execution of the lumber company was occasioned by the omission of the defendant, Paddock, to satisfy the same, and therefore such act of the sheriff was that of defendant Paddock in so far as plaintiff was concerned. *Brown v. Hawkins*, 54 Mo. App. 75; *Kennedy v. Dodson*, 44 Mo. App. 550. Paddock made it impossible for himself or his sureties to render in execution his interest in the leasehold according to the obligation of his recognizance by his omission to satisfy the execution of the lumber company, and thereby occasioning the sale thereof by the sheriff, and further by obtaining and perpetuating the stay of plaintiff's execution by entering into the recognizance sued on. The principle is elemental that a party to a contract may break it by rendering the performance of the conditions thereof impossible. *Heard v. Bowers*, 23 Pick. 455; *Wolf v. Marsh*, 54 Cal. 228; *Dill v. Pope*, 29 Kan. 289; *Newcomb v. Brackett*, 16 Mass. 161; *Packer v. Seward*, 34 Vt. 127. It having become impossible for the reasons we have stated, for the defendants to render in execution the property of the defendant, Paddock, according to one of the conditions of the recognizance, there was nothing left for

them to do but to perform the other, viz., pay the plaintiff's execution debts and costs.

The rule is that when the condition of a bond is to do one of two things, if one cannot be performed, unless it has become impossible by the acts of the obligee, the obligor is bound to perform the other. *Mill Dam Foundry v. Hovey*, 21 Pick. 443; *Jacquinet v. Boutron*, 19 La. Ann. 30. But if the performance of the second condition in said recognizance, which required defendants to render in execution the property of defendant Paddock, if the application for the stay of execution should finally be determined against him, was impossible at the time the recognizance was entered into, then it remained for the defendants but to perform the first alternative condition. *Pinder v. Upton*, 44 N. H. 358.

It thus appearing that the defendants have committed a breach of the conditions of the recognizance for which, as far as we have been able to discover, they have been unable to show any legal excuse, the defense that the defendants have tendered the plaintiff his *pro rata share* in the proceeds arising from the sale of Paddock's property under the execution of the lumber company, we think, constitutes no sort of defense to the plaintiff's action. Upon no principle can this be considered an excuse for the defendants' breach of their recognizance. It follows that the defendants' instruction was erroneous and should not have been given.

The remaining question to be considered is as to the measure of damages resulting from the breach of the recognizance. This is a suit on a recognizance with a penalty. The law fixes the rule by which the damages shall be estimated in case of forfeiture. *Page v. Butler*, 15 Mo. 74.

But whatever the rule may be in other cases, here the parties by the express terms of their own recogni-

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zance have agreed that if the application for the stay of the execution should be finally determined against Paddock, and they did not thereupon render in execution his property that they would pay the "debt and costs to be recovered by plaintiff's execution." The plaintiff's first instruction was in accord with this view of the *quantum* of damages to which plaintiff was entitled to recover, and so it ought to have been given.

The judgment will be reversed and the cause remanded. All concur.

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JOHN M. HICKMAN, SR., Plaintiff, v. JOHN M. HICKMAN, JR., Appellant, THOMAS J. HICKMAN *et al.*, Respondents.

**Kansas City Court of Appeals, November 5 and December 4, 1893.**

1. **Deed:** CONSIDERATION: PAROL EVIDENCE. The consideration of a deed is ordinarily open and not concluded by that which is recited, and additional consideration may be shown, but it must not be inconsistent with the terms of the deed itself.

2. ———: GENERAL WARRANTY: PAROL AGREEMENT: RESERVATION OF POSSESSION. A contemporaneous oral agreement that the grantor in a general warranty deed is to remain in possession of the premises and enjoy the profits thereof, is inconsistent with the deed itself purporting to convey the title, and is in contradiction to the covenants therein.

3. **Sales:** WHAT IS BOUGHT. *Arguendo,* the sale of a thing imports, from its very nature, the obligation on the part of a seller to secure to the purchaser the possession and enjoyment of the thing bought, the right to possess and enjoy being really that which is purchased.

4. **Deed:** CONSIDERATION: PAROL AGREEMENT: RESULTING TRUST. On motion for rehearing, the authorities are further reviewed and the foregoing propositions again asserted, and it is further *held,* that the consideration of a deed cannot be so questioned by parol as to have the effect to create a resulting trust in the grantor.

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*Appeal from the Buchanan Circuit Court*.—HON. A. M. WOODSON, Judge.

REVERSED.

*Spencer & Mosman* for appellant.

This defendant, in his amendment to his answer made to put in issue the new matter, introduced by the amendment into said "cross bill," specifically called the attention of the court to the deed and to the fact that no recovery on the grounds stated in said amendment could be had under said deed. Defendants, Thomas and Richard Hickman, introduced in evidence their deed to this defendant for the land. This deed contained no such contract as that stated by John M. Hickman in his evidence, in relation to his codefendants retaining for eight years the possession of forty-five acres of this land. This evidence was in direct contradiction tó the deed, for it by its terms the possession of the entire land was delivered to John M. Hickman. No rule of evidence is better settled than that which declares that parol evidence cannot be received to contradict the terms of valid written instruments. *Tracy v. Iron Works*, 104 Mo. 198, 199. Such instruments are held to supersede all prior contracts relating to the same subject-matter, whether verbal or written, and in the absence of fraud or mistake, the law conclusively presumes that the whole engagement and the extent and manner of the undertaking is contained therein. *Chrisman v. Hodges*, 75 Mo. 413; *Morgan v. Porter*, 103 Mo. 140; *State ex rel. v. Hoshaw*, 98 Mo. 358. We objected to the investigation of these collateral issues when first presented, and strenuously opposed the application of said codefendants for leave to amend their cross bill, but our objections were over-

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ruled and our opposition disregarded. We urge that the court erred in both of said rulings.

*Hall & Pike* and *Franklin Porter* for respondents.

"The consideration expressed in a deed is open to parol explanation for most purposes." *Bobb v. Bobb*, 89 Mo. 419. The evidence was within the rule. *Williams v. Railroad*, 112 Mo. 485.

STATEMENT BY ELLISON, J.

THIS was a suit brought by John Hickman, Sr., against Thomas J. Hickman, and Richard G. Hickman, to enforce a vendor's lien for the unpaid balance of the purchase money due from said Richard and Thomas to him, against the land in the hands of their brother and codefendant, John M. Hickman, who had purchased it of his codefendants. The petition charged that John M. Hickman purchased with notice that a part of the purchase price was still unpaid by his vendors, and prayed judgment against Thomas J. Hickman and Richard G. Hickman for the amount of the debt, and that the same be declared a first lien upon the land of the defendant John M. Hickman, and that it be ordered to be sold to satisfy the same.

The separate answer of defendant, John M. Hickman, was a general denial.

Defendants, John J. Hickman and Richard C. Hickman, answered, admitting all the allegations of plaintiff's petition, and, with the consent of plaintiff first had and obtained, proceeded to set up in the same pleading a cross action in their favor and against their codefendant, John M. Hickman, charging that they had sold and conveyed the land mentioned in the petition to defendant, John M. Hickman, for the price of $6,850; that he had paid $3,743.30, by discharging



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an incumbrance on the land; and that the balance, $3,106.70 remains wholly due and unpaid, for which sum and the interest thereon, they asked judgment against said John M. Hickman.

Defendant, John M. Hickman, filed his motion to strike said cross bill from the files, which was overruled.

Defendant, John M. Hickman, then filed an answer to said cross bill, in which he admitted that he purchased said land of his codefendants and received a deed therefor, and denied that he ever at any time agreed to buy the land at the price stated, or ever agreed to pay such sum for the land. He charged that said land was about to be sold under a mortgage; that his codefendants were afraid that it would not bring the amount due on the mortgage as the purchase price thereof; and defendant charged that he had kept and performed in full his agreement, and defendant further pleaded a general denial to all the averments of said cross bill.

A jury having been waived and the evidence being all introduced, the plaintiff and defendants submitted all and singular the matters to the judgment of the court. Whereupon the court announced its decision in favor of plaintiff, John M. Hickman, Sr., upon the cause of action stated in the petition, and also in favor of said John M. Hickman upon the cross bill filed by his codefendants. Whereupon, the defendants, Thomas J. and Richard Hickman, prayed the court for permission to amend their cross bill so as to conform to the evidence given in the case. Defendant, John M. Hickman objected, for the reason that it introduced a new and entirely different cause of action from that declared on in the cross bill; that they could not declare on one cause of action and recover upon another; that the evidence, which was wholly irrelevant, was objected to

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at the time because irrelevant and immaterial, and because the judgment could not be attacked in this collateral way. Which objections were overruled and defendants were permitted to amend their cross bill by adding the following: "That defendant, John Milton Hickman, also, in addition to said consideration, agreed that these defendants should remain in possession of the south forty-five acres of the land above described, for the period of eight years from said date, and to have the full use and enjoyment thereof, to make all they could out of it. That in violation of his agreement with them the said Milton ejected them from the premises, and in April, 1891, ousted them therefrom, and has ever since kept them out of the use and occupation of said land, to their damage in the sum of $1,200."

Defendant, John M. Hickman, duly excepted to the ruling of the court permitting said amendment, and thereupon amended his answer to the cross bill, as follows, to-wit: "Defendant, John M. Hickman, for answer to the amended cross bill of his codefendants, seeking a recovery on the ground that they had been deprived of the possession of from forty to forty-five acres of land, which it is alleged, under the contract of sale, they were entitled to the possession of for eight years, say, that in an action brought by him against said defendants, in division number 2, of this court, he was awarded possession of said land by the judgment of said court; that said action was tried upon its merits, after a full investigation of all the matters and things set up in said amended cross bill, on which a recovery is now sought, and said judgment remains unappealed from and conclusive upon the parties, and this defendant pleads the same in bar of any recovery upon the facts in said amended cross bill stated. Defendant further says that under the deed from said

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codefendants to this defendant, no recovery can be had upon the matter in said amended cross bill stated."

The matters being again submitted to the court, it found that defendant, John M. Hickman, had agreed to let his codefendants have possession of the house and forty-five acres off the south side of said land for a period of eight years; that he had ejected them from the possession thereof, on March 5, 1892, by process issued to enforce the judgment of the circuit court in an action brought by him against his codefendants, and that the rental value of said premises was $765. Whereupon the court found for the defendants, Thomas J. Hickman and Richard G. Hickman, and against John M. Hickman, for said sum of $765, with interest from date, and declared that the same be a lien on said land, and that the same be sold to satisfy the same.

Ellison, J.—By reference to the statement in this cause it will be seen that defendant, John M. Hickman, purchased the lands described of his codefendants, Thomas and Richard; that Thomas and Richard executed to him a general warranty deed in fee simple for the premises in which deed the consideration is expressed to be "the sum of $6,850, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged." To support their cross bill, defendants, Thomas and Richard, were permitted to show that there was an additional consideration for the conveyance, not expressed in the deed, viz., that said John M. Hickman, the grantee, was to permit Thomas and Richard to remain in possession and use of forty-five acres of the land conveyed for eight years from the date of the deed; that he refused to so permit them, but on the contrary ousted them therefrom to their damage in the

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sum of $765. And the court found for defendants, Thomas and Richard under this evidence.

It is quite true that the consideration in a deed is ordinary open and not concluded by that which is recited. We went over this ground in *Jackson v. Railroad*, — Mo. —. You may show additional consideration to that recited in the deed, but it must not be *inconsistent* with the terms of the deed itself. The additional consideration which the court here permitted to be shown was inconsistent with the conveyance of the title as expressed in the *deed*. The deed without reservation purported to grant the land *itself* with all which that implies.

Such a deed is, in effect, a deed to the possession and enjoyment of the premises. "The sale of a thing imports, from its very nature, an obligation on the part of the seller to secure to the purchaser the possession and enjoyment of the thing bought, *the right to possess and enjoy being really that which is purchased.*" *Dickson v. Desire*, 23 Mo. 151. It is "an ancient maxim of the law that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit-droit*. And when to this double right the actual possession is also united, when there is, according to the expression of Fleta, *juris et seisinae conjunctio*, then, and then only, is the title completely legal." 2 Blackstone, 199.

Besides this, the deed here contained covenant of indefeasible seisin in fee simple; as also the covenant of quiet enjoyment which means, as its terms imply, that it shall be lawful for the grantee to peaceably enter at any and all times and to enjoy the shelter and profits of the estate without let or hindrance from the grantor, or other persons claiming under him. 3 Washburn on Real Property, 660 (side page).

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It is thus apparent that a contemporaneous oral agreement that the grantor in a general warranty deed is to remain in possession of the premises conveyed and enjoy the profits thereof, is inconsistent with the deed itself purporting to convey the title, and is in contradiction to the covenants therein as herein indicated. Proof of such an agreement under the guise of additional consideration, would be in the face of the chief operative effect of a deed. It would nullify the deed by oral testimony. If it is allowable to show by oral testimony that the grantee in a deed is not to have possession and use of the land conveyed for eight years, it would be equally as proper to show the term to be any longer period, which is but a step from an *entire* destruction of the grantee's estate. "Where the operation of the deed, in respect to the interest or estate purporting to be conveyed, is sought to be affected, such testimony is inadmissible." *Henderson v. Henderson*, 13 Mo. 151.

The amendment setting up the aforesaid additional consideration for the deed aforesaid, and the evidence in support thereof, were improperly allowed. The judment will be reversed. All concur.

ON MOTION FOR REHEARING.

ELLISON, J.—We are asked to grant a rehearing in this case on the ground that the opinion is not in harmony with *Aull Savings Bank v. Aull*, 80 Mo. 199. In that case the familiar principle of law that the consideration clause in a deed can be explained or contradicted is asserted and the evidence in that was said not to contradict the terms of the deed. The action was by the grantee for the rent of a room occupied by the grantor at the time and for a long period after conveying the property to the grantee. The court expressly

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conceded that "a reservation of real estate can only be made by deed." And then proceeded to say that; "The question is not what the parties could do, *but what did they do.*" The court then adds that if the plaintiff in that case without a reservation formally made in the deed granted to defendant certain privileges (that of occupying the room) it is quite too late after years have gone by, to raise the point now that the reservation of those privileges should have been made in the deed with all the formality incident to a technical reservation. That the court never intended to say that you may restrict the operation of the deed as a conveyance of the absolute title by parol testimony, under the guise of inquiring into the consideration, is quite evident from the expressions of that court both before and since the *Aull case.* "Where the operation of the deed, in respect to the interest or estate purporting to be conveyed, is sought to be affected, such testimony is inadmissible." *Henderson v. Henderson*, 13 Mo. 151. Judge SHERWOOD, speaking of parol proof of consideration in *McConnell v. Brayner*, 63 Mo. 464, says that: "It is not permitted by parol to so vary or control the operative words of the deed as to defeat it as a conveyance." And so he gives expression, in effect, to the same thing in *Lambert v. Estes*, 99 Mo. 808. And so BLACK, J., speaking for the court in *Bobb v. Bobb*, 89 Mo. 419, says that inquiry against the recitation of the consideration clause cannot be had for the purpose of defeating the operative words of the deed, citing *Henderson v. Henderson, supra.*

That proof in the case at bar that the grantors were to remain in possession, occupancy and enjoyment of the fruits of the property they had absolutely conveyed by deed to the grantee was proof of a reservation, there cannot be the slightest doubt. The

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operative effect of the deed was, of course, to place the grantees in the possession and profits of the land; the evidence admitted was a restriction of this effect of the deed. And having this effect it should not have been admitted. The rule permitting evidence to vary the consideration of a deed is limited to such evidence as is consistent with the operative effect and purpose of the deed. "Its legal import cannot be varied." *Kimball v. Walker*, 30 Ill. 511; *Godfrey v. Beardsley*, 2 McLean, C. C. 414; *Grount v. Townsend*, 2 Denio, 339; *Morese v. Chattuck*, 4 N, H. 230; *Rhine v. Ellen*, 36 Cal. 369; *Farrington v. Barr*, 36 N. H. 86; *Goodspeed v. Fuller*, 46 Me. 147.

The grantor "is forever estopped to deny his deed for the uses and purposes therein mentioned." So far as the deed is intended by its terms to pass a right, it cannot be contradicted. *McCrea v. Purmont*, 16 Wend. 460, and authorities cited. All of the foregoing cases agree that the consideration cannot be so questioned by parol as to have the effect to create a resulting trust in the grantor. And this is, in effect, what is sought to be accomplished in this case. The motion will be overruled.

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## W. B. PEARSON, Respondent, v. F. L. GILLETT, Appellant.

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**Kansas City Court of Appeals, November 6, 1893.**

1. Jurisdiction: APPEAL: AFFIDAVIT: APPEARANCE. The circuit court has concurrent jurisdiction with a justice of the peace in an action to recover damages for injuries to plaintiff's crops; and where the justice grants an appeal and files the paper in the circuit clerk's office and the parties appear and go to trial on the merits without objection to the appeal affidavit or the jurisdiction, it must be construed as an admission of the jurisdiction of the court and a waiver of all defects in taking the appeal.

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2. **Trial Practice:** REOPENING CASE. It is all proper for the trial court to permit the reopening of the evidence when once closed, if the ends of justice at the time appear to require it.

3. **Appellate Practice:** OBJECTION AND EXCEPTION. Objection and exception must be preserved in the bill of exceptions to warrant to the consideration of objections to admission of evidence in the appellate court.

4. ———: TRIAL BEFORE COURT. Where the trial was before the court without instructions and the evidence supports the finding, the appellate court will presume the trial court entertained a correct view of the law and not disturb the judgment.

*On Motion for Rehearing.*

5. **Jurisdiction:** JUSTICE OF PEACE: AFFIDAVIT: ABSTRACT. Although appellant abstract does not contain the affidavit for an attachment filed with the justice, yet, as the justice's transcript states one was filed, and defendant's plea in abatement in the circuit court denies the allegations of the affidavit, the contention that the affidavit was filed to authorize the attachment must be *held* unfounded.

6. **Attachment:** JURISDICTION: TORT: STATUTE: CIVIL ACTION. The Missouri statute furnishes a remedy by attachment in all civil actions, whether resting on contract or sounding in tort.

*Appeal from Boone Circuit Court.*—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

*Gordon, Gordon & Gordon* for appellant.

(1) The circuit court obtained no jurisdiction of the subject-matter of this cause by appeal from the justice, because the affidavit for appeal fails to show whether the appeal is from the merits or judgment taxing cost. Revised Statutes, 1889, sec. 6330; *Whitehead v. Cole & Rodgers*, 49 Mo. App. 428; *Spencer v. Beasley*, 48 Mo. App. 97. (2) The circuit court obtained no jurisdiction of the subject-matter of this cause by appeal, because the record of the justice fails to show that an affidavit and bond for appeal was filed

with the justice and an appeal granted, or that the allowance of the appeal was procured by proceedings in the circuit court. *Devore v. Staeckler*, 49 Mo. App. 547. (3) The justice had no jurisdiction of the subject matter of the action, for the reason that no affidavit was filed with the justice to authorize him to issue the writ of attachment. *Bank v. Garton*, 40 Mo. App. 113, and authorities cited; *Norman v. Horn*, 36 Mo. App. 419. (4) Appellant could not waive, and did not waive, jurisdiction of the subject matter of the action, and it can be raised for the first time in the appellate court. Revised Statutes, 1889, sec. 2047; *Smith v. Burrus*, 106 Mo. 97; *Proctor v. Railroad*, 42 Mo. App. 127; *Paddock v. Somes*, 102 Mo. 235, and authorities cited; *Anderson v. McPike*, 41 Mo. App. 331. (5) Neither the justice or circuit court has jurisdiction to issue a writ of attachment on a demand for unliquidated damages, except where the damages arise from the commission of a felony, misdemeanor or seduction of a female. Revised Statutes, 1889. sec. 521, 12th subdiv; *Deering & Co. v. Collins*, 38 Mo. App. 80; 7 Lawson's Rights and Remedies, sec. 3506; *Tabor v. Co.*, 14 Fed. Rep. 636.

*W. E. Nicklin*, *C. B. Sebastian* and *Sam. C. Major* for respondent.

(1) The circuit court may permit the reopening of plaintiff's or defendant's evidence when once closed, if the ends of justice at the time appear to require it. *Taylor v. Case*, 97 Mo. 243; *Guenther v. Railroad*, 95 Mo. 286. (2) We next invite the attention of the court to the point number 5, made by appellant, that no sufficient affidavit for an appeal was made by appellant in the justice's court. To a proper determination of this question I call the attention of the court to the

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record in the case. The transcript of the justice's docket shows the following entry made on his docket: "Appeal granted this January 4, 1893." This is all the entry of record on his docket that the law requires. See "Duty of Justice Allowing Appeal," Revised Statutes, 1889, sec. 6332. The justice shall then file in the office of appellate court, a transcript of his docket entries, together with all other papers relating to the suit. The appellee was thus fully advised that the appeal had been taken from the merits, and both the appellant and appellee summoned their witnesses, appeared in court, answered ready and proceeded with the trial. The court had undoubted jurisdiction over the subject-matter of this suit; jurisdiction over the subject-matter must come from the law; and the circuit court had concurrent original jurisdiction with the justice of the peace of this action. Revised Statutes, 1889, sec. 3318. And the voluntary appearance answering ready and proceeding with the trial by appellant, he cannot now deny that the court obtained jurisdiction of the cause. *Page v. Railroad*, 61 Mo. 78; *Bohn v. Devlin*, 28 Mo. 319; *Orear v. Clough*, 52 Mo. 55, 118; *Griffen v. VanMeeter*, 53 Mo. 430; *Peters v. Railroad*, 59 Mo. 406; *Kronski v. Railroad*, 77 Mo. 362; *Bates v. Scott Bros.*, 26 Mo. App. 428; *Pry v. Railroad*, 73 Mo. 127. The only exceptions to this universal rule, are that class of cases where the circuit court has not original, but only appellate, jurisdiction,—such cases as forcibly entry and detainer. *McQuid v. Lamb*, 19 Mo. App. 153; *Bauer v. Cabanne*, 11 Mo. App. 114; *Robinson v. Walker*, 45 Mo. 117. In order to authorize an appellate court to reverse a judgment in a case commenced before a justice of the peace, for want of jurisdiction, it must appear that the question of jurisdiction was raised and passed upon in the circuit court. *Batchelor v. Bess*, 22 Mo. 403; *Bridge Co. v. Railroad*, 72 Mo. 664; *Chidsey*

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*v. Powell*, 91 Mo. 623; *Nall v. Railroad*, 97 Mo. 68; *Claflin v. Sylvester*, 99 Mo. 277.

Smith, P. J.—This was an action by attachment commenced by the plaintiff against the defendant and one Smith before a justice of the peace to recover damages for injuries to the plaintiff's crops.

The action was dismissed before the justice as to Smith. The remaining defendant filed no plea in abatement. There was a trial on the merits which resulted in judgment for the plaintiff, and from which defendant appealed to the circuit court, where the defendant was permitted to file a plea in abatement. A trial was had before the court on both the plea in abatement and the merits, which resulted in a judgment for the defendant on the issue made by the plea in abatement, and in favor of the plaintiff on the merits, for the sum of $130, and from which latter judgment the defendant took an appeal here.

The defendant has assigned several grounds for the reversal of the judgment. The first which we shall notice is, that the circuit court obtained no jurisdiction of the subject-matter of the cause by appeal from the justice for the reason that the affidavit for the appeal fails to show whether the appeal is from the merits or the judgment taxing costs. Revised Statutes, sec. 6330. Conceding that the affidavit is defective in the particulars indicated, still we must think the objection to the jurisdiction not well taken. The circuit court, it may be assumed, had concurrent original jurisdiction with the justice of the peace over the subject-matter of the action. Revised Statutes, sec. 3318. The record shows that the justice by an entry on his docket granted the appeal and thereafter filed in the office of the clerk of the circuit court a transcript of his docket entries together with all other papers relating to the

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suit, in conformity to the statutory requirements. Revised Statutes, secs. 6332, 6337. Now, suppose the affidavit was defective; yet, since the defendant voluntarily appeared in the circuit court and went to trial on the merits without making any objection to the sufficiency of the affidavit or the defect of jurisdiction, this must be construed as an admission by him that he was subject to the jurisdiction of the court in the case and as a waiver of all previous defects in the manner of taking the appeal.

The case is not different than if the complaint had been originally filed in the circuit court and the defendant had voluntarily appeared thereto and proceeded to trial without the previous service of notice or process. After judgment he could not be heard to controvert the jurisdiction of the court. *Sampson v. Thompson*, decided at the present term. *Page v. Railroad*, 61 Mo. 78; *Bohn v. Devlin*, 28 Mo. 319; *Orear v. Clough*, 52 Mo. 55, 118; *Griffen v. VanMeeter*, 53 Mo. 430; *Peters v. Railroad*, 59 Mo. 406; *Kronski v. Railroad*, 77 Mo. 362; *Bates v. Scott Bros.*, 26 Mo. App. 428; *Pry v. Railroad*, 73 Mo. 127; *Griffin v. Samual*, 6 Mo. 52; McQuillan's Pleading and Practice, sec. 331. The jurisdictional point must be ruled against defendant.

It is always proper for the trial court to permit the reopening of plaintiff's or defendant's evidence when once closed, if the ends of justice at the time appear to require it (*Taylor v. Cayce*, 97 Mo. 243); and so it is not perceived that the action of the trial court complained of in this regard was improper.

As to the objection that the plaintiff should not have been permitted to prove the actual possession or ownership of the land upon which the trespass was committed because it had not been alleged in the statement of his cause of action, it is sufficient to say that no such objection was taken at the trial and made the

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basis of an exception and preserved in the bill of exceptions; but, if so, we think the statement sufficiently alleges the ownership and possession of the land, and so this point must likewise be ruled against the defendant.

The case was tried by the court without the intervention of a jury. No instructions were asked or given. And, as there seems to have been some substantial evidence to support the judgment, we must presume the trial court entertained a correct view of the law, and so we cannot disturb its judgment.

The plaintiff in his brief insists that the judgment for the defendant on the plea in abatement should be reversed for certain reasons therein mentioned. But as no exceptions were taken and preserved to the rulings of the court in respect to the disposition of any matter pertaining to that branch of the case, there is nothing before us for review.

It results that the judgment of the circuit court will be affirmed. All concur.

ON MOTION FOR REHEARING.

SMITH, P. J.—After we have given due consideration to every point of objection urged against the judgment by defendant, either in his oral argument or printed brief, and have ruled upon the same adversely to him he now by his motion for the first time suggests that the justice had no jurisdiction of "the subject matter of the suit" for the reason, *first*, there was no affidavit filed in said suit before the justice upon which the attachment was issued; and, *second*, that the action was founded on a demand for unliquidated damages. It is a sufficient answer to the first of these objections to say that the abstract of the record discloses that this entry appeared in the justice's transcript, viz:

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"The above petition was filed with the justice, December 7, 1892; summons issued, returnable on the twenty-fourth day of December, 1892, and on the fourth day of December, 1892, affidavit and bond filed with the justice, and an attachment writ was issued, returnable on the twenty-fourth day of December, 1892. December 24, plaintiff dismissed his cause of action on the merits against defendant, G. C. Smith, and, no plea in abatement being filed in behalf of the other defendant, F. L. Gillett, the cause proceeded to trial upon the merits, before a jury of six competent men. After hearing all the evidence and argument the jury returned into court the following verdict: 'We, the jury, give plaintiff $65. J. L. Burroughs, Foreman.'"

Now the defendant has not seen proper to set forth in his abstract the affidavit filed before the justice of the peace; but in the counter-abstract of the plaintiff it appears that when the cause reached the circuit court the defendant then in pursuance of the leave granted him for that purpose filed his plea in abatement wherein he denied "the truth of the facts alleged in the plaintiff's affidavit for attachment herein" and further denied that "he is a nonresident of the state or that he is about to remove his property or effects out this state with intent to defraud, hinder or delay his creditors." So that the contention that there was no affidavit filed before the justice to authorize the issue of the attachment process, must be held unfounded.

And, as to the other ground of objection, it may be stated that in the absence of statutory provision allowing attachments to issue in actions founded on tort that such actions will not lie. Drake on Attachment [6 Ed.], section 10. But the statute of this state furnishes the remedy in *all civil actions* whether resting on contract *or sounding in tort.* Revised Statutes, 1889, sec. 521; Revised Statutes, 1879, sec.

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398; Revised Statutes, 1865, sec. 1, p. 561; Revised Statutes, 1855, sec. 1, p. 238; Revised Statutes, 1849, sec. 1, p. 133; *Finlay v. Bryson*, 84 Mo. 664; *Houston v. Woolley*, 37 Mo. App. 15; *Deering v. Collins*, 38 Mo. App. 80.

What was said by us by way of exposition of the language of section 521, Revised Statutes, in *Houston v. Woolley*, *supra*, need not be repeated here. The conclusion there expressed was that the words "any civil action" as employed in that section were broad and comprehensive enough to embrace all actions at law whether resting on contract or sounding in tort. Entertaining these views, it results that the motion must be denied.

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TRORLICHT, DUNKER & RENARD CARPET COMPANY, Appellant, v. W. H. HATTON, Defendant; M. A. HATTON, Interpleader and Respondent.

Kansas City Court of Appeals, December 4, 1893.

1. **Fraudulent Conveyances:** EVIDENCE: INSTRUCTIONS. The evidence in this case fails to show fraud, and the instructions, if erroneous, are so in being unnecessarily liberal to plaintiff.

2. **Instructions:** TRIAL BEFORE COURT. In a trial before the court, the same strictness is not required in the instructions as is demanded before a jury.

*Appeal from the Boone Circuit Court.*—HON. JNO. A. HOCKADAY, Judge.

AFFIRMED.

*C. B. Sebastian* for appellant.

The declarations of law given by the court at the instance of the interpleader show that the case was tried upon the wrong theory, and the finding shows

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that it was followed by an erroneous verdict. It is true the court gave the decaration of the law offered by the defendant in the interplea. *McNichols v. Rubleman*, 13 Mo. App. 515; *Seger's Sons v. Thomas Bros.*, 107 Mo. 635. How the trial court could declare the law of this case to embrace both doctrines when they have nothing in common and are entirely distinct, is a mystery to me. "Each instruction must be correct in itself, and all must be consistent with each other, and the whole taken together must present but one doctrine." *Modisett v. McPike*, 74 Mo. 636; *Thomas v. Babb*, 45 Mo. 384.

*Gordon, Gordon & Gordon* for respondent.

(1) The court committed no error in giving instruction numbered 3 for interpleader. *Forrester v. Moore*, 77 Mo. 651; *Shelly v. Boothe*, 73 Mo. 74; *Homes v. Braidwood*, 82 Mo. 610; *Albert v. Besel*, 88 Mo. 152; *Foster v. Planing Mill Co.*, 92 Mo. 88; *Sexton v. Anderson*, 95 Mo. 379; *Deering & Co. v. Collins & Son*, 38 Mo. App. 79; *State to use v. Laurie*, 1 Mo. App. 379; *Coffin Co. v. Rubleman*, 15 Mo. App. 287. (2) This court will not reverse a judgment because one of the instructions given might be technically erroneous, provided the instructions given, all taken together, fairly present the law on both sides of the case to the jury, or court sitting as a jury, and the whole in a manner that is not calculated to mislead. *Spillane v. Railroad*, 111 Mo. 564; *Bank v. Hatch*, 98 Mo. 378; *Muehlhausen v. Railroad*, 91 Mo. 346; *Whalen v. Railroad*, 60 Mo. 327; *Karle v. Railroad*, 55 Mo. 482. (3) Where the trial court is intrusted with both facts and law, the appellate court must assume the facts to be as the trial court found them, and has only the power to review the law declared by said court. *Swayze v. Bride*, 34



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Mo. App. 416; *Taylor v. Penquite*, 35 Mo. App. 403, 525; *Gaines v. Fender*, 82 Mo. 509; *Hamilton v. Bogges*, 63 Mo. 252.

Ellison, J.—Plaintiff brought this suit by attachment and levied upon a small stock of merchandise as the property of defendant. Interpleader filed her interplea for the property, and, on a trial before the court without a jury, recovered. Plaintiffs appeal.

It seems that interpleader was surety for defendant for the sum of $500, which defendant owed the Exchange National Bank of Columbia. That she remained his surety through several renewals up to the fifteenth of February, 1893. The bank demanded payment, and defendant executed and delivered to her, as reimbursement or indemnity, his note due one day after date, secured by a chattel mortgage on the goods in controversy. This mortgage was duly recorded, and a sale was thereafter had under its provisions in that regard, the interpleader becoming the purchaser. It is not claimed that the debt for which interpleader was surety was not real; or that she had not assumed it; or that she did not afterwards pay it. There was evidence tending to show a proper foreclosure (without fraud) of the chattel mortgage, and we are at a loss to find any just ground of complaint by plaintiff as to the finding made by the lower court.

There is a contention here that the court gave declarations of law for the respective parties which are inconsistent. It must be remembered, however, that this case was heard by the court without a jury, and the same strictness is not required in instructions that would be demanded were they presented to a jury. The declarations given for interpleader were proper, and, if there was anything approaching error, it was in giving the declaration asked by plaintiff, that is to

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say, he was treated with more liberality by the court than was altogether necessary. The effect of the declarations, when read together, was to find for plaintiff if there was any fraud on the part of interpleader whether her claim was founded on a title as mortgagee or as absolute owner. If there was any inconsistency in the declaration it was all in favor of plaintiff, and it ought not to complain. In our opinion, the trial court could scarcely have found otherwise than it did.

We have given attention to the different suggestions made here by plaintiff, both at the oral argument and in the brief, especially as to how interpleader claimed the goods, and we find ourselves unable to say that any error has been committed. We affirm the judgment. All concur.

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SCOTT D. GORDON, Respondent, v. LOUIS ISMAY, Defendant; AMBROSE ISMAY, Interpleader and Appellant. 55 323 / 85 121

**Kansas City Court of Appeals, December 4, 1893.**

**Appellate Practice:** EVIDENCE: FRAUD. **Fraud does not have to be shown by direct testimony, and may be inferred from circumstances, though it must be proved and never presumed; and where there is evidence thereof, as in this case, the finding of the lower court will not be disturbed.**

*Appeal from the Boone Circuit Court.*—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

*Bailey & Tincher* and *C. B. Sebastian* for appellant.

(1) The evidence shows that interpleader had taken possession of the property in controversy after the conditions of the mortgage had been broken, and

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he had a right to hold it until his interest was satisfied. *Printing Press Co. v. Roeder*, 44 Mo. App. 324; *Bank v. Metcalf*, 29 Mo. App. 384. (2) Under the law given by the court the finding must have been upon the impression that the mortgage was not accepted in good faith for the purpose of securing an honest debt. There is no evidence to sustain the finding, and our supreme court and this court have uniformly ruled that a verdict unsupported by substantial evidence will not be allowed to stand. *Reno v. Kingsbury*, 39 Mo. App. 240; *Avery v. Fitzgerald*, 94 Mo. 207; *Long v. Moon*, 107 Mo. 334.

*Gordon, Gordon & Gordon* for respondent.

(1) Where the trial court is intrusted with both facts and law, the appellate court must assume the facts to be as the trial court found them, and has only the power to review the law declared by said court. *Swayze v. Bride*, 34 Mo. App. 416; *Taylor v. Penquite*, 35 Mo. App. 403 and 525; *Gaines v. Fender*, 82 Mo. 509; *Hamilton v. Bogges*, 63 Mo. 252. (2) Fraud, it is true, must be proved and cannot be presumed, and direct and positive evidence is not necessary to establish it. It may be inferred from the facts and circumstances in evidence, pertinent and bearing upon the question at issue. *Renney v. Williams*, 89 Mo. 145.

ELLISON, J.—Plaintiff brought an attachment suit against defendant in which the attachment writ was levied upon a lot of brick and other personal property as being the property of defendant. Interpleader filed an interplea claiming the property under a chattel mortgage executed to him by the defendant in the attachment securing an indebtedness which defendant was alleged to be owing to him. The issue tried on the interplea was as to the *bona fides* of the debt secured by

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this mortgage; plaintiff alleging that the mortgage was made in fraud of creditors, and that, the fraud was known to, and participated in, by the interpleader. The trial was submitted to the court without a jury. All declarations asked by interpleader were given. None were asked by plaintiff. The finding and judgment was for plaintiff.

We are asked by interpleader to reverse this judgment on the ground that there was no evidence whatever to sustain it. A careful examination of the testimony has failed to impress us with interpleader's view. The fraud charged here does not necessarily have to be shown by direct testimony. It may be inferred from circumstances shown in evidence. While fraud will not be presumed and must be proven by the party holding the affirmative, yet it is a subject for legitimate inference which may arise from facts disclosed by the case. With this statement it is sufficient to say, without going into a tedious detail of the evidence, that there was evidence in the cause tending to support the finding, and we will affirm the judgment. All concur.

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THE STATE OF MISSOURI, Respondent, v. GEORGE MOHR, Appellant.

**Kansas City Court of Appeals, November 6 and December 4, 1893.**

1. **Gaming:** INDICTMENT: IDEM SONANS. "Mohr" and "Moores" are not *idem sonans*, and an indictment charging "Mohr" with permitting gaming in a room of which "Moores" had possession and control, is bad.

2. **Idem Sonans:** RULE. Names are *idem sonans* when the attentive ear finds difficulty in distinguishing them when pronounced in ordinary usage.

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*On Motion for Rehearing.*

3. **Gaming: INDICTMENT.** Whether an indictment for permitting the setting up of a gaming device would be sufficient by simply alleging that the house was occupied by the defendant, *quære;* and whether occupancy is tantamount to control, *quære;* but the indictment in this case negatives defendant's control by alleging possession and control in another.

*Appeal from the Callaway Circuit Court.*—HON. JOHN A. HOCKADAY, Judge.

REVERSED.

*Bailey & Tincher* for appellant.

The indictment charges that, "one George Mohr" did, etc., in a room in which the said "George Moores" had the possession, etc. "George Mohr" and "George Moores" are not "*Idem Sonans*;" are different persons, and for this the indictment is bad. 16 American and English Encyclopedia, p. 122.

*R. F. Walker* and *Morton Jourdan* for respondent.

The indictment in this case clearly charges the offense of which the defendant has been convicted, and the judgment should be affirmed.

ELLISON, J.—Defendant was indicted, tried and convicted under section 3810, Revised Statutes, 1889, for unlawfully permitting a gaming device to be used for gaming in a building in his possession and control. The indictment charged that "George Mohr on" etc., "at" etc., "did unlawfully permit a certain gambling device" etc., "to be used for the purpose of gaming, in a certain building there situate and in a certain room in the said building by him occupied, and of which said room in said building he, the said George Moores, then and there had the possession and control," etc.

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Are "Mohr" and "Moores" *idem sonans?* We are of the opinion that they are not. It matters little how names are spelled, they are *idem sonans*, within the meaning of the authorities, if the attentive ear finds difficulty in distinguishing them when pronounced in ordinary usage. *Chamberlain v. Blodgett*, 96 Mo. 484. If there is no such difficulty they are not of the same sound. There is no difficulty whatever in distinguishing the pronunciation of the two names set forth in this indictment. The addition of the letter "s" in the latter name makes it different in fact and in sound from the first.

In *The King v. Samuel Shakespeare*, 10 East. 83, where the defendant was indicted as Samuel Shakepear, it was held fatal. Lord Ellenborough said: "That the final 'e' might not make a material difference, but the omission of the 's' in the middle makes it a differently sounding name from the true one." The names Frank and Franks were held not to be the same name nor alike in sound. *Parchman v. State*, 2 Texas App. 228. So of Wood and Woods, *Neiderluck v. State*, 21 Texas App. 320. So of Wilkin and Wilkins, in *Brown v. State*, (Court of App. Texas, 1889). And so of Humphrey and Humphreys, in *Humphrey v. Whitten*, 17 Ala. 30.

The misdemeanor as defined by the statute is the setting up a gaming device in any house of which the defendant has "at the time the possession and control." In this indictment the possession and control is alleged to be in a George Moores, who is not the defendant. There was, therefore, no misdemeanor charged and a conviction cannot be sustained.

Other points were made by defendant which are not necessary to notice. Many of them could not be noticed, as they were not saved by an exception to order overruling the motion for a new trial.

Reversed. All concur.

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ON MOTION FOR REHEARING.

ELLISON, J.—The statute on which this indictment is based, section 3810, is as follows: "Every person who shall permit any gaming table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or of which he hath at the time the possession or control, shall, on conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail or workhouse for not more than one year nor less than thirty days, or by fine not exceeding $500 or less than $50.

It is now contended by the state that the indictment at bar is sufficient by stopping at the words "by him occupied" and rejecting as surplusage the words which immediately follow them, viz: "and of which said room in said building he, the said George Moores, then and there had the possession and control." Passing by the question, whether the rule as to surplusage has any application to a defect of the nature here complained of, we will dispose of the motion on grounds considered in the opinion. It will be noticed that the statute and the indictment are not levelled at the party setting up the device himself, but at the party who permits it to be done in a house. *State v. Gilmore*, 98 Mo. 211, 214. It is not necessary to say, as contended by the state, that this indictment would have been sufficient by simply alleging that the house was occupied by the defendant. It may be (though we do not say) that to allege that the house was occupied by defendant would be tantamount, under the statute, to saying it was under his control. But certain it is that to permit anything to be done in a house means the power to control the house; and whether saying that one occu-

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pies a house or room, without more, is equivalent to saying he is in control of it, need not be decided, since in this case the indictment itself negatives that defendant was in control by expressly alleging the room to have been in the possession and under the control of another party.

The motion should be overruled.

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THE STATE OF MISSOURI, Respondent, v. GEORGE MOHR, Appellant.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Gaming:** INDICTMENT, OBJECTIONS TO. It is not fatal to an indictment under section 3810, Revised Statute, 1889, for permitting gaming device on premises, that it charges the device was "called" a pack of cards, instead of "was" a pack of cards.

2. ———: ———: GAMING DEVICE. A pack of cards is a gaming device; and an indictment is not bad for using the word "gambling" instead of "gaming."

3. **Common Gaming House:** ROOM OF HOUSE. A common gaming house may be set up and kept in a single room of a house of many rooms, and the indictment need not allege the other rooms were unoccupied.

*Appeal from the Callaway Circuit Court.*—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

*Bailey & Tincher* for appellant.

(1) It will be observed from the indictment that the "gambling device" is not named. The indictment says, "a certain gambling device 'called' a pack of cards." The indictment should allege that the gambling device 'was' a pack of cards. (2) The indictment charges that the device was "called a pack of cards." If the device had been alleged to have been a pack of

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cards, the indictment would yet be bad, for, "a pack of cards" is not a gaming table, bank or device within the meaning of section 3808, nor 3810, Statutes, 1889. *State v. Gilmore*, 98 Mo. 206. (3) The indictment charges "did unlawfully permit a certain gambling device." The statute "is any gaming table," etc. A "gaming table, bank or device," is a very different thing from a "gambling device" as described in the indictment. (4) The indictment charges the permission of a gambling device in a room of a house, the room only being in the possession and control of defendant. To bring the charge within section 3810, the indictment should negative the fact that the balance of the house was occupied. *Sisk v. State* (Tex), 13 S. W. Rep. 647.

*R. F. Walker* and *Morton Jourdan* for respondent.

The indictment in this case clearly charges the offense of which the defendant has been convicted, and the judgment should be affirmed.

Ellison, J.—The defendant was convicted under section 3810, Revised Statute, 1889, for permitting "a certain gambling device called a pack of cards, designed and used for the purpose of playing games of chance for money and property, to be used for the purpose of gaming in a certain building there situated, and in a certain room in the said building by him occupied, and of which said room in said building he, the said George Mohr, then and there had the possession and control."

Many of the objections urged here, like those in a like case against this defendant, decided at this term, cannot be noticed, for the reason that no exceptions were taken at the trial. We will, therefore, pass to the sufficiency of the indictment.

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I. The first objection is that the indictment should have alleged that the gambling device *was* a pack of cards instead of alleging that it was "called" a pack of cards. This is not a good objection.

II. It is next objected that a pack of cards is not a gaming device within the meaning of section 3810. This is not a valid objection, and it has been so held under statutes, so far as this objection is concerned, like the present law. *State v. Scaggs*, 33 Mo. 92; *State Herryford*, 19 Mo. 377.

III. The next objection urged is that as the statute reads, "any gaming * * * device," and the indictment uses the words "gambling device," it is insufficient. This objection is not well taken. A gaming device and a gambling device are, in the sense of the statute, one and the same thing. *State v. Dyson*, 39 Mo. App. 297.

IV. It is next contended that as the indictment charges the device to have been permitted in a room of a certain house, which room was in the control and possession of defendant, that it should have alleged that the balance of the house was not occupied. This contention is not sound and the authority cited in its support is not applicable. We ruled in *State v. Mosby*, 53 Mo. App. 571, that a common gaming house might be set up and kept in a single room of a house of many rooms.

The indictment being under section 3810, the objection founded upon the hypothesis that it was under section 3808 is not tenable.

A thorough examination of the record satisfies us that the judgment should be affirmed, and it is so ordered. All concur.

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# THE STATE OF MISSOURI, Appellant, v. J. D. MORSE, Respondent.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Information:** SUFFICENCY OF INFORMATION: SURPLUSAGE. An information under section 3592, Revised Statutes, 1889, which charges the defendant did willfully and maliciously cut down, break and injure a portion of a certain fence, while it contains words descriptive of the offense, in addition to those employed in the statute, but as they neither enlarge or diminish the meaning of the statutory words, they may be rejected as surplusage.

2. ———: SUFFICIENCY OF COMPLAINT. The same technical accuracy is not required in a complaint as in an information, and though the former does not use the statutory words, yet if it use words of equivalent import, it authorizes the filing of an information.

3. ———: AFFIDAVIT. It is no objection to an information that it fails to charge that it is based upon an affidavit.

*Appeal from the Audrain Circuit Court.*—HON. E. M. HUGHES, Judge.

REVERSED AND REMANDED.

*Robert Shackelford* and *Geo. Robertson* for appellant.

(1) The information is sufficient under section 4329, Revised Statutes, 1889. *State v. Ramsey*, 52 Mo. App. 668; *State v. Webb*, 47 Mo. App. 599. (2) The information is sufficient and charges an offense under either section 3592 or 3593, Revised Statutes, 1889. This information follows the language of the statute of the first section cited and is, therefore, good. *State v. Tissing*, 74 Mo. 72; *State v. Anderson*, 81 Mo. 78. Where the exact words of the statute are not used and words of equivalent import are used, this is sufficient. *State v. Ware*, 62 Mo. 597; *State v. Watson*, 65 Mo. 115; *State v. West*, 21 Mo. App. 309.

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*W. W. Fry* for respondent.

(1) The information is based on section 3593, Revised Statutes, 1889. The offence is cutting a fence "belonging to and inclosing lands not his own." Neither the affidavit nor information charge the act was done "wantonly and without right." The fence might have belonged to Harper all on his land, and at the same time enclosed lands of defendant. They do not charge an offense under section 3592. "The fence must belong to and enclose lands not defendant's." *State v. Coy*, 47 Mo. App. 187. (2) There is a fatal variance between the affidavit and the information. An affidavit must set forth the offense with the same certainty as is necessary in an information. *State v. Cornett*, 45 Mo. App. 95; *State v. Gartmell*, 14 Ind. 280; *State v. Coy*, 47 Mo. App. 187; *City of Galt v. Elder*, 47 Mo. App. 164. The affidavit charges cutting wire fences on affiant's farm; the information, that he cut a certain fence enclosing the farm. The former does not charge that it did not enclose defendant's land, etc. A sufficient information will not aid a defective affidavit. *State v. Cornett*, *supra*; *State v. Davidson*, 46 Mo. App. 9. (3) The information fails to charge that it is based upon an affidavit filed with the justice or delivered to the prosecuting attorney. Revised Statutes, 1889, sec. 4329; *State v. Ransberger*, 106 Mo. 135.

Smith, P. J.—One Thomas R. Harper filed a complaint before the justice alleging that the defendant "did maliciously, wrongfully and unlawfully cut his wire fences" on his farm in a certain section, township and range. At a day subsequently the prosecuting attorney filed with the justice an information charging that the defendant did unlawfully, willfully and mali-

ciously cut down, break and injure a portion of a wire fence, being the property belonging to one Thomas R. Harper which enclosed the farm and crops of the said Thomas R. Harper and situated in certain section, township and range, in which the said J. D. Morse had at the time no interest.

The defendant in the circuit court filed a motion to quash the information based on grounds which we shall presently notice. The court sustained the motion and gave judgment accordingly, and from which the state has appealed.

It is contended that the information charges no offense known to the law. It was no doubt based upon section 3592, Revised Statutes. It charges that the defendant did "willfully and maliciously cut down, break and injure a portion of a certain wire fence belonging to one Thomas R. Harper," etc. This was sufficiently descriptive of the offense under the section just referred to. The information in *State v. McCoy*, 47 Mo. App. 187, was framed upon section 3593, where the language employed is different from that in section 3592. It is true the information contains words descriptive of the offense in addition to those employed in the statute; but, as these neither enlarge or diminish the meaning of the statutory words, they may be rejected as surplusage, leaving the offense described in the language of the section which is all that is required. *State v. Ramsey*, 52 Mo. App. 668.

It only appears inferentially from the record that the information was founded on the complaint. It does not appear that the defendant was arrested on the complaint. The information was not filed until twenty-five days after the complaint. It may be that information was filed upon the knowledge, information or belief of the prosecuting attorney independent of the complaint. But, however this may be, we are of

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the opinion that the complaint sufficiently charges an offense to authorize the filing of the information founded thereon. We do not think that the same technical accuracy is required in describing an offense in the complaint as in the information. If a complaint fail to use the exact words of the statute in charging the offense, but employs words of equivalent import, this ought to be sufficient to authorize the prosecuting attorney to file an information founded thereon. *State v. Ware*, 62 Mo. 597; *State v. Watson*, 65 Mo. 115; *State v. West*, 21 Mo. App. 309.

The objection that the information fails to charge that it is based upon an affidavit filed with the justice or delivered to the prosecuting attorney, is sufficiently answered by the cases of *State v. Webb*, 47 Mo. App. 599; *State v. Ransberger*, 106 Mo. 135.

It follows that the judgment should be reversed and the cause remanded. All concur.

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CHICAGO, SANTA FE & CALIFORNIA RAILWAY COMPANY, Appellant, v. REUBEN EUBANK, Respondent.

**Kansas City Court of Appeals, December 4, 1893.**

**Appellate Jurisdiction: CONDEMNATION PROCEEDING: TITLE TO LAND. A proceeding to condemn land for a railroad right of way involves title to real estate, and the supreme court has exclusive appellate jurisdiction and is required to exercise exclusive superintending control over the trial court in such causes.**

*Appeal from the Chariton Circuit Court.*—HON. G. D. BURGESS, Judge.

TRANSFERRED TO SUPREME COURT.

*Gardiner Lathrop, I. H. Kinley* and *S. W. Moore* for appellant.

The exact question here presented was decided adversely to the respondent by the supreme court of

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Missouri in *Railroad v. Fowler*, 20 S. W. Rep. 1069. It was there held that the land owner is not entitled to interest on the award, since he has the right to withdraw it at any time. For this reason we ask that the judgment of the circuit court be reversed and the cause remanded, with directions to enter judgment for $1,600.

*Syd. B. Burks*, *Thos. Shackelford* and *Crawley & Son* for respondent.

Appellant having failed to file such an abstract of the record as is required by rule 15 of this court, respondent submits that the appeal should be dismissed. *School Dist. v. Clark*, decided at October term, 1892, of this court (not reported). *Travis v. Ins. Co.*, 47 Mo. App. 482; *Merrill v. Trust Co.*, 46 Mo. App. 237; *Calvert v. Bates*, 44 Mo. App. 626; *Grundy v. Rogers*, 42 Mo. App. 465; *Christopher v. White*, 42 Mo. App. 428; *Scott v. Howard*, 41 Mo. App. 488; *Bank v. Davidson*, 40 Mo. App. 421; *Shaw v. Bryan*, 39 Mo. App. 523; *Nichols v. Nichols*, 39 Mo. App. 291; *City of Kansas v. O'Connor*, 36 Mo. App. 594; *In re Redding Brothers*, 31 Mo. App. 425; *Guinn v. Boas*, 31 Mo. App. 131; *Goodson v. Railroad*, 23 Mo. App. 76; *Coy v. Robinson*, 20 Mo. App. 462; *Hausmann v. Hope*, 20 Mo. App. 193.

Smith, P. J.—This was a condemnation proceeding instituted by the plaintiff in 1887 to acquire a right of way for its railroad. The court appointed commissioners, who assessed the damages at $1,600. The plaintiff filed exceptions to the report and demanded a jury trial. This was denied and an appeal was taken to the supreme court, where the right to a jury trial was sustained and the cause remanded. In October, 1892, a jury was impaneled, and after a portion of the

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evidence was heard, the plaintiff withdrew its exceptions. The defendant asked that interest be allowed upon the award from the date of the appropriation to the date of the trial, and this request was granted by the court, against plaintiff's objection, and the interest made a part of the judgment. After an unsuccessful motion for a new trial this appeal was taken.

It has been ruled in a number of instances, both by the St. Louis court of appeals and by us, that a proceeding by a railroad company to condemn land for its right of way is a suit involving title to real estate within the meaning of section 12, article 6, of the constitution of this state. *Railroad v. Leeright*, 44 Mo. App. 212; *Musick v. Railroad*, 43 Mo. App. 326; *Hughes v. Mermod*, 44 Mo. App. 288; *Railway v. McGregor*, 53 Mo. App. 366. In this class of cases the supreme court has not only exclusive jurisdiction, but by the terms of section five of the amendment to the constitution adopted in 1884, that court is required to exercise exclusive superintending control over the action of trial courts in respect to such cases. *Railroad v. McGregor, supra; State ex rel. Huston v. Ganzhorn*, 52 Mo. App. 220; *State ex rel. Auditorum v. Allen*, 45 Mo. App. 551; *State ex rel. Blakemore v. Rombauer*, 101 Mo. 499. It is therefore manifest that this case is of the class which is excluded by the terms of the constitution from our appellate jurisdiction. We have no jurisdiction to review the action of the trial court on appeal or writ of error in a case of this kind.

We will, therefore, order the record to be transferred to the supreme court, where there is jurisdiction to entertain the appeal.



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JOHN MYERS, Respondent, v. A. C. MILLER, Appellant.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Judgments:** COLLATERAL ATTACK: STRANGERS: INFERIOR COURT. When a court has jurisdiction of the parties and the subject-matter, the judgment is binding and effectual upon all the parties and their privies and cannot be questioned in a collateral proceeding, and this rule obtains as well in cases in justices' courts and other statutory courts as in courts of record; but such rule does not extend to strangers, who may set up the defense of fraud in obtaining it whenever it is attempted by it to affect their rights.

2. ———: ———: EVIDENCE. The evidence in this case is sufficient to take the question of fraud in obtaining the judgment, on which appellant relied, to the jury, and support the finding.

3. **Appellate Practice:** TRIAL BOFORE COURT: INSTRUCTIONS. A judgment will not be reversed because the trial court, sitting as a jury, fails to declare the law as full as it might have done; especially so, when the instructions given announce correct rules of law applicable to the facts and the whole evidence justifies the finding.

4. **Forcible Entry and Detainer:** JUDGMENT: INSTRUCTION. Instructions given and refused in reference to forcible entry and detainer, and a judgment set up in defense, are considered.

*Appeal from the Carroll Circuit Court.*—HON. E. J. BROADUS, Judge.

AFFIRMED.

*Kinley & Kinley* for appellant.

(1) If Gilliam owned and was in the actual possession of the land up to the time it washed away, and then, upon its re-formation exercised dominion over it, claiming it, used it for cutting poles and tobacco sticks from till 1887, when he located the lines around the land, had the lines cleared away to show where they

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were, and to fence, located the corners, and began clearing the land, he was in such actual possession thereof that Reece's intrusion and occupancy in the spring of 1888 was a forcible entry upon Gilliam's possession. *Bartlett v. Draper*, 23 Mo. 407; *King's Adm'r v. St. Louis Gas Light Co.*, 36 Mo. 34–39; *Miller v. Northup*, 49 Mo. 397–400; *Bradley v. West*, 69 Mo. 59–63, and cases cited; *Willis v. Stevens*, 24 Mo. App. 494. (2) If Reece had acquired possession of the land in controversy by a forcible entry on Gilliam's possession, and afterward conveyed his claim to plaintiff, no greater right to possession was vested in plaintiff than Reece had; and if Reece was in possession of the land when Gilliam instituted his suit in forcible entry and detainer against Reece before Farrington, then neither Myers nor anyone else should have been made parties, nor could Reece have avoided his liability to an action in forcible entry by attempting to convey the land. The only person against whom the action could be maintained is the party in actual possession. *Orrick v. Public Schools*, 32 Mo. 315. (3) The judgment in favor of Gilliam against Reece, before justice Farrington for restitution of the land, being regular with personal service on Reece, could not be collaterally attacked by Myers in any event. *Hardin v. Lee*, 51 Mo. 241; *Johns v. Platton*, 55 Iowa, 665; *Winn v. Cory*, 48 Mo. 349. This judgment could not be attacked collaterally for any reason by Reece, nor could it be so attacked by Reece's grantee. Myers who was claiming under the quitclaim deed from Reece to Myers and Coffey, which conveyance was after Reece's forcible entry and was taken by plaintiff with full knowledge of Reece being a trespasser, and that Gilliam had sued him. *State v. Evans*, 83 Mo. 319; *Yates v. Johnson*, 17 Mo. 213; *Sachse v. Clingingsmith*, 97 Mo. 406; *Karnes v. Alexander*, 92 Mo. 660, and cases cited; *Jeffries v.*

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*Wright*, 51 Mo. 215–221; *State ex rel. v. Donegan*, 12 Mo. App. 190; s. c., 83 Mo. 374; *Sloan v. Mitchell*, 84 Mo. 546; *McClanahan v. West*, 100 Mo. 309; *Fulkerson v. Davenport*, 70 Mo. 541; *Hope v. Blair*, 105 Mo. 105; *Homer v. Fish*, 1 Pick. (Mass.) 435; *Exendine v. Morris*, 76 Mo. 416; *Johnson v. Beazley*, 65 Mo. 250; *Rowden v. Brown*, 91 Mo. 429. (4) The court erred in permitting the respondent to attack the judgment in favor of *Gilliam v. Reece* before justice Farrington collaterally, even if fraud and collusion were proven, of which, however, there is no evidence. *Mason v. Messenger et al.*, 17 Iowa, 261, third part of opinion on page 272; *Smith v. Smith*, 22 Iowa, 516; *Cooper v. Reynold's Lessee*, 10 Wallace (U. S.), 308; *State v. Evans*, 83 Mo. 319; *McClanahan v. West*, 100 Mo. 309; Van Fleet's Collateral Attack, secs. 12, 16, 17, also Title, Presumptions. (5) There was absolutely no evidence to support the second instruction given on behalf of plaintiff. Both Gilliam and Reece testified there was no agreement or collusion between them concerning the suit before Farrington. Instructions should be based on some evidence in the case, not on counsel's suspicions, pages 41–47, 56, 57, 58 of abstract. *Johnson v. Quarles*, 46 Mo. 423; *Forrester v. Scoville*, 51 Mo. 268; *Kennedy v. Kennedy*, 57 Mo. 73; *Worley v. Dryden*, *Ib.* 233; *Rogers v. Rogers*, 87 Mo. 257; *Jackson v. Wood*, 88 Mo. 76; *Philpott v. Penn*, 91 Mo. 38.

*C. Hammond & Son* for respondent.

(1) The undisputed facts in this case are that Myers and Coffey after their purchase of the land in controversy from Reece, July 21, 1890, leased it to defendant, Miller, and the other tenants named in the lease read in evidence by plaintiff. Their term did not

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expire until January 1, 1891. At the expiration of their lease, or whenever they left the premises, the right of possession immediately devolved upon Myers and Coffey. Miller, the defendant, could not lawfully surrender the possession to anyone else during his term or at its expiration, nor could he accept a lease form anyone else. *Gooch v. Hannon*, 30 Mo. App. 450; *May v. Luckett*, 48 Mo. 472. (2) At the time of the institution of the forcible entry suit of *Gilliam v. Reece*, November 26, 1890, in Egypt township, Reece was not in possession of any part of the land in controversy in this suit. His possession was confined to his cabin and five acres around it, not included in this suit. Miller and the other lessees of Myers and Coffey were in the actual possession of the land in controversy, their crops not yet having all been removed and their lease not having expired. They were not "the servants or under control" of Reece in any way, and, therefore, could not be "expelled and removed" under a writ of restitution against Reece, though it had been a legal writ. 2 Revised Statutes, sec. 5163. The court in giving instructions numbered 1 and 2 in behalf of plaintiff, and in rendering judgment, necessarily found the facts as above stated. (3) The Egyptian judgment having been obtained by collusion between Gilliam, Reece and defendant Miller, Gilliam acquired no right under it, and the possession of Miller obtained from Gilliam could not be set up to defeat plaintiff in this action. Upon the facts as found by the court, instruction number 3 for plaintiff was properly given. It is contended, however, that the judgment cannot be attacked in this collateral proceeding, "even if fraud and collusion were proven." As between third parties or strangers whose prior rights are sought to be affected by such judgments, the whole weight of authority is in favor of collateral attack. *Meadows v. Duchess of King-*

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*ston*, Amb. 759; 1 Chitty's Pleading, [10 Am. Ed.] 579–589; vol. 2, 1166; *Callahan v. Griswold*, 9 Mo. 792; Freeman on Judgments [3 Ed.], p. 377; *Frazier v. Gates*, 61 Ill. 180. Our contention on this point is abundantly sustained by the following, among many other high authorities. Bigelow on Estoppel [5 Ed.], pp. 209–219; *Ogle v. Baker*, 21 Am. St. Rep. 887; *Earl of Baudon v. Becher*, 3 Cl. & Fin. 479; *Webster v. Reid*, 11 How. (U. S.) 437; *Hackett v. Manlove*, 14 Cal. 85; *Hammock v. McBride*, 6 Ga. 178; *Freyandall v. Baldwin*, 103 Ill. 325; *DeArmond v. Adams*, 25 Ind. 458; *Sidensparker v. Sidensparker*, 52 Me. 481; *Pierce v. Jackson*, 6 Mass. 242; *Bergeman v. Hutcheson*, 60 Miss. 872; *Ins. Co. v. Wilson*, 34 N. Y. 409; *Meeker v. Straat*, 38 Mo. App. 239.

SMITH, P. J.—This was an action of unlawful detainer. The undisputed facts showed that the land in controversy was originally situated in Chariton county, and that in 1856 the Missouri river begun to encroach upon it so that by 1868 it was entirely washed away. In the year 1878 it was re-formed by the action of the waters of the Missouri and Grand rivers. When re-formed, it was found situate on the west side of Grand river, by reason of which it became embraced within the territorial limits of Carroll county.

There was a trial in the circuit court, which resulted in judgment for the plaintiff, and from which defendant has appealed.

The defendant by his appeal assails the judgment mainly on the ground that the trial court erred in declaring the law to be that if it, sitting as a jury, found from the evidence that the judgment and writ of restitution in the forcible entry suit of *Gilliam v. Reece* was prosecuted by collusion between said Gilliam and Reece without notice to Myers and Coffey, then

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Gilliam acquired no right under said judgment and writ to the possession of the land described in the complaint as against Myers, and the possession of Miller obtained from Gilliam cannot be set up to defeat plaintiff's recovery. We are thus called upon to decide whether this theory of the case announced by the trial court accords with the law.

It is conceded that the justice, by whom the judgment was rendered, had jurisdiction of the parties and the subject-matter of the action, and that the judgment was regular on its face, so that the vital question involved is, whether the judgment was open to collateral attack by plaintiff. The rule to be deduced from the cases in this state is, when a court has jurisdiction of the parties and the subject-matter, the judgment is binding and effectual upon all the parties and their privies, and that it cannot be questioned by them in a collateral proceeding. *Yates v. Johnson*, 87 Mo. 213; *Forder v. Davis*, 38 Mo. 108; *Pentz v. Kuester*, 41 Mo. 447; *Gray v. Bowles*, 74 Mo. 419; *Karnes v. Alexander*, 92 Mo. 660; *Haggard v. Railroad*, 63 Mo. 302; *Baker v. Baker*, 70 Mo. 136; *Carpenter v. King*, 42 Mo. 219; *State v. Evans*, 83 Mo. 319; *Johnson v. Beazley*, 65 Mo. 250; *Lewis v. Gray*, 66 Mo. 614; *Fulkerson v. Davenport*, 70 Mo. 546; *Henry v. McKerdie*, 78 Mo. 416; *Scott v. Crews*, 72 Mo. 263; *State v. Weatherby*, 45 Mo. 17; *Jeffries v. Wright*, 51 Mo. 220. Nor are the judgments of justices of the peace or other statutory courts, where jurisdiction appears to have attached, any more subject to collateral attack than those of courts of record. *Jeffries v. Wright*, 51 Mo. 215–221; *State ex rel. v. Donegan*, 12 Mo. App. 190; s. c., 83 Mo. 374; *Sloan v. Mitchell*, 84 Mo. 546; *McClanahan v. West*, 100 Mo. 309; *Fulkerson v. Davenport*, 70 Mo. 541; *Hope v. Blair*, 105 Mo. 105; *Exendine v. Morris*, 76

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Mo. 416; *Johnson v. Beazley, supra; Rowden v. Brown*, 91 Mo. 429.

But may not such a judgment be collaterally attacked for fraud in its procurement by one who is a stranger to it? As was remarked by the judge who delivered the opinion in *McClanahan v. West*, 100 Mo. 309, the authorities differ on the point whether a judgment can be attacked for fraud, or whether it alone can be done by a direct proceeding. In Vanfleet on Collateral Attack, section 13, it is stated that in ejectment the defendant cannot raise the question that a deed offered by plaintiff was procured by fraud or deceit, and so in regard to a judgment. And a similar statement of the law has been announced by the supreme court of Iowa (*Mason v. Messinger*, 17 Iowa, 261; *Smith v. Smith*, 22 Iowa, 272), and perhaps by the appellate courts of some of the other states. But, many very respectable authorities hold that this rule while extending to parties and privies does not exist as to strangers to the judgment. Since the latter have no right to vacate or reverse it by a proceeding for that purpose, it results from the necessity of the case they ought as a general rule be permitted to set up the defense of fraud in obtaining it whenever it is attempted by it to affect their rights. Bigelow on Estoppel [5 Ed], 209 to 217; Freeman on Judgments, secs. 334–336; *Hall v. Hamlin*, 2 Watts, 354; *State v. Little*, 1 N. H. 257; *Murchison v. White*, 54 Tex. 78; *Sidensparker v. Sidensparker*, 52 Me. 481; *Granger v. Cram*, 32 Me. 130; *Thompson's Appeal*, 57 Pa. St. 175; *Frazier v. Gates*, 61 Ill. 180.

The supreme court of the United States in *Webster v. Reid*, 11 Howard, 437, which was an action of ejectment where the plaintiff in the trial court gave in evidence a sheriff's deed and also the judgments and executions on which it was founded, and the defendant

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offered to prove that the judgment, execution and sheriff's deed were procured by fraud of the plaintiff, which offer was rejected by the court,—the defendant being a stranger to the judgment he sought thus to attack collaterally,—in the opinion of the court, which was delivered by Justice McClain, said that the "district court erred in overruling the evidence offered by defendant to prove fraud in the judgments, executions, sheriff's sales and deed. When a judgment is brought collaterally before the court as evidence, it may be shown to be void upon its face by want of notice to the person against whom judgment is rendered, or for fraud." *Gaines v. Relf*, 12 How. 472, is to the same effect.

In the consideration of the rule embodied in the declaration of the trial court to which we have already referred, we are entirely relieved of the embarrassment which the conflicting authorities just cited otherwise might have occasioned us by the ruling made by the supreme court of this state in *Callahan v. Griswold*, 9 Mo. 457, where it was declared by so eminent a jurist as Judge NAPTON that "the judgment of a court of competent jurisdiction cannot be impeached collaterally in another court in an action between the same parties, etc. The party must apply to the court which pronounced the judgment to have it vacated. This principle does not prevent a party who was a stranger to the proceeding and had no opportunity to defend against such judgment from showing that it was procured by fraud and that an unconscientious use is about to be made of it." It must, therefore, be ruled that the theory declared by the trial court was correct if the evidence adduced tended to support its hypothesis.

There was introduced evidence which tended to show that Myers and Coffey, after their purchase from the Keyte heirs, had instituted a suit in ejectment

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against Reece in the Carroll circuit court, and this suit was settled by their purchase of Reece's claim and title. At the time of their purchase from Reece he had leased all of the land, except about five acres, to a number of different tenants, among them the defendant, Miller; and after Reece made his deed, he and all his tenants became the tenants of Myers and Coffey until January 1, 1891, the tenants by written lease, and Reece by positive agreement. So that from and after the twenty-fourth day of July, 1890, they, Myers and Coffey, were in the absolute possession of the entire tract by their said tenants; Reece himself only occupying about five acres in the west forty, the remaining seventy-five acres being occupied by defendant, Miller, and the other tenants, all of whom had grown crops on the land in the year 1890, which crops were not all removed until about the first of January, 1891.

This was the situation on the twenty-fifth day of November, 1890, when Mr. Gilliam, who then had an ejectment suit pending in the Chariton circuit court, on change of venue from Carroll circuit court, went to the extreme western side of Carroll county, between thirty and forty miles from where the land is situated and all the parties resided, passing over three or four townships, and the county seat, and there instituted a suit of forcible entry and detainer against Reece for the entire eighty acres. The testimony shows that outside of defendant Miller, who told Reece that "a suit was being *gotton up*," Gilliam, wife, and possibly his partner, a Mr. Griffin, no one else within thirty miles of where this land lies was permitted to know anything about the suit.

Reece did not notify Myers of the commencement of the suit by Gilliam against him. He suffered judgment to go by default. The judgment was rendered on Saturday and on Monday following a writ of restitu-

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tion was placed in the hands of the constable, who, in company with Gilliam, went to put Reece out. He was found at his cabin with the defendant, Miller, who there in conversation with Gilliam stated that if he, Gilliam, got the land back that he, Miller, wanted to rent it. The constable read the writ to Reece. Reece then gave Gilliam the keys to the cabin. Some of Reece's household goods were in and some out of the cabin. Gilliam then locked the cabin door. Reece then proposed to rent of Gilliam, and then the latter gave him back the keys. The matter ended by Reece remaining peaceably in possession of his cabin and by Miller, who then held a lease from Myers and Coffey not yet expired, becoming Gilliam's tenant. Gilliam paid all the costs.

We cannot, therefore, say there was no evidence to justify the finding by the court that the judgment was procured by fraud. These facts and circumstances were such as to authorize the inference of fraud. What was said in *Walser v. Graham*, 45 Mo. App. 629, applies to the conduct of Reece in respect to the plaintiff, under whom he, as tenant, was holding at the time he was sued by Gilliam.

As a legal proposition it is likely correct, as the defendant contends, that if it was a fact Gilliam owned and was in the *actual* possession of the land up to the time it washed away, and then upon its re-formation exercised dominion over it, claiming it, using it for cutting poles and tobacco sticks from it till 1887, when he located the lines around the land, had lines cleared away to show where they were, and to fence, located the corners, and began clearing the land, he was in such actual possessson thereof that Reece's intrusion and occupancy in the spring of 1888, was a forcible entry upon Gilliam's possession; and that if Reece had acquired possession by a forcible entry on Gilliam's

possession, and afterwards conveyed his claim to plaintiff, no greater right to possession was vested in plaintiff than Reece had; and if Reece was in possession of the land when Gilliam instituted his suit in forcible entry and detainer against Reece before Farrington, then neither Myers nor any one else should have been made parties, nor could Reece have avoided his liability to an action in forcible entry by attempting to convey the land. The court was not asked to so declare the law. We may presume the court entertained this view of the law, in the absence of any declaration showing the contrary. It may have found the facts did not support this theory, or it may have concluded from the evidence that Enlow, under whom Reece claimed, was the first person to take possession of the land after its restoration, and that Reece had not, therefore, invaded the possession of Gilliam at all. The evidence as to whether Gilliam or Enlow was first to take possession of the *locus in quo* was so conflicting as to have justified the finding either way.

A judgment will not be reversed because that trial court sitting as a jury fails to declare the law as full as it might have done, especially so if the declarations which are given announce correct rules of law applicable to the facts which the evidence tends to prove, and the whole evidence justifies the finding.

It follows from what has been said that the declaration of law requested by defendant to the effect that, if Gilliam took possession of the premises in question on or about December 10, 1890, by virtue of a writ of ouster issued by justice of the peace, Farrington, a justice of the peace of Egypt township, Carroll county, Missouri, in the suit of Thomas E. Gilliam *v.* Wm. W. Reece, said writ having been issued by virtue of a judgment of forcible entry and detainer, wherein personal service was had on said Reece in a suit by said

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Gilliam *v.* said Reece, and that said Gilliam was put in possession by the constable, and when said Gilliam was put in possession of said land by the constable in execution of said writ, no one was in possession of said land, except said Reece, and the crops had been removed therefrom, and that said Gilliam afterwards rented said land to said Miller, and he was holding said land under said leasing by Gilliam, then the finding of the court must be for defendant, and that defendant is not guilty as charged in the complaint, was properly refused.

The judgment will be affirmed. All concur.

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ROCK ISLAND PLOW COMPANY, Appellant, v. LANG & GRAY, Defendants; C. FINK, Interpleader and Respondent. 55 349 81 311

**Kansas City Court of Appeals, December 4, 1893.**

1. **Assignment: PARTNERS MAY MAKE: WHO OBJECT.** Though one partner is not authorized, by virtue of the partnership relation alone, to make a voluntary assignment for the firm, yet he may do so with the express assent and direction of the other members; and the other partners alone have the right to complain of such assignment, and not firm creditors.

2. ———: FILING OF DEED: ATTACHMENT. A plaintiff in an attachment instituted and tried after the execution and delivery of the deed of assignment and the possession of the assignee thereunder, but before it is filed for record, does not acquire a right superior to the assignee.

3. ———: FRAUD: ESTOPPEL. The evidence in this case shows no fraud on the part of assignor or assignee, and there is no estoppel in the case, since none is pleaded.

*Appeal from the Carroll Circuit Court.*—HON. E. J. BROADUS, Judge.

AFFIRMED.

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*Lozier & Morris* for appellants.

(1) The evidence was sufficient to justify a submission of the question of fraud to the jury. If the assignee participated in the fraud, then the assignment was void. Prior and subsequent illegal actions of the parties to the deed of assignment are proper to be submitted to the jury as evidence of the fraudulent intent of the parties at the date of the assignment. *State to use, etc. v. Benoist*, 37 Mo. 501, 514; *Goodwin v. Kerr*, 80 Mo. 276; *Adler v. Lang*, 21 Mo. App. 516; *Hazell v. Bank*, 95 Mo. 60; *Hatcher v. Winters*, 71 Mo. 30; *State to use, etc. v. Adler*, 97 Mo. 413; *Crow v. Beardsley*, 68 Mo. 345; *Gates v. Lebeaume*, 19 Mo. 25; *Wise v. Wimer*, 23 Mo. 273; *Reed v. Pelletier*, 28 Mo. 173; *State to use v. Patrick*, 49 Mo. 548. (2) One partner cannot make a valid assignment of partnership property without the express direction, assent and authority of the other. No such authority can be implied from the partnership relation. That Lang had such authority from Gray, nowhere satisfactorily appears from the evidence. His communication with his partner tends to prove that he had no such authority. A subsequent ratification cannot relate back so as to interfere with intervening leins. Burrill on Assignment, secs. 79, 84, 87, 89, 244; *Drake v. Rogers*, 6 Mo. 317; *Hughes v. Ellison*, 5 Mo. 463; *Hook v. Stone*, 34 Mo. 329; *Candy Co. v. Walker*, 46 Mo. App. 482; *Wilcox v. Jackson*, 7 Col. 521; *Loeb v. Pierpoint*, 58 Iowa, 469; *Stein v. Ladow*, 13 Minn. 412; *Dunklin v. Kimbell*, 50 Ala. 251; *Shattock v. Chandler*, 40 Kan. 516; *Collier v. Hannah*, 71 Ind. 253; 1 Bates on Partnership, secs. 338, 339; 1 American and English Encyclopedia of Law, p. 847, *et seq*; vol. 17, p. 1045, 1047, 1048, and cases cited. (3) The title to the assigned property did not pass nor the

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beneficial interest of creditors attach until the deed of assignment was filed in the recorder's office. Revised Statutes, 1889, sec. 424; Marks Appeal, 85 Pa. St. 239; *Rendleman v. Willard*, 15 Mo. App. 375; *Hughes v. Ellison*, 5 Mo. 484; *Chalfin v. Rosenberg*, 42 Mo. 349; *Strong v. Carrier*, 17 Conn. 319; Burrill on Assignment, secs. 252, 296, 297, and pp. 381, 382, 383 and 389. (4) The assignment was not made nor accepted in good faith. Immediate possession must follow a deed of assignment. Possession by the assignor after assignment will render it void as to attaching creditors. Merely signed the deed, if the deed is withheld from the record, is not accepting the trust. There must be a *bona fide* delivery and such change of possession as is observable without inquiry and such as will apprise the community that a change has taken place. Burrill on Assignments, sec. 265, 268, 270, 273, 277, 280, 296 and 400; *Woolson v. Pipher*, 100 Ind. 306; *Crosby v. Hillyer*, 4 Wend. 280; *Kuykendall v. McDonald*, 15 Mo. 416; *Brooks v. Wimer*, 20 Mo. 503; *Hatcher v. Winter*, 71 Mo. 35; *Bishop v. O'Connell*, 56 Mo. 168; *Wright v. McCormick*, 67 Mo. 426; 2 Kent's Commentaries, 529, note *e*; Bump on Fraudulent Conveyances, 210, 212, 132, 136, 174. (5) Interpleader, by his own action, is estopped from setting up any claim, as against plaintiff, to attached property. To the sheriff, before the levy, he disclaimed any interest in the whole transaction, and by word and action invited the plaintiff to make the levy. He cannot be permitted now to set up a claim inconsistent with his claims made before the levy. 3 Bigelow on Estoppel, 484; *Guffey v. O'Reiley*, 88 Mo. 418; *Taylor v. Elliott*, 3 Mo. 172; *Rice v. Bunce*, 49 Mo. 231; *Lawrence v. Owens*, 39 Mo. App. 318; *Olden v. Hendricks*, 100 Mo. 533.

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*S. J. Jones* and *J. L. Minnis* for respondent.

(1) The action of the court below in taking the case from the jury was proper. Under the evidence in this case it would have been the plain duty of the trial court, had the jury on the proof found for the plaintiff, to have awarded a new trial. In such a case it is the duty of the trial court to decline to submit the cause to the judgment of the jury. *Hausmann v. Hope*, 20 Mo. App. 193; *Jackson et al. v. Hardin et al.* 83 Mo. 175; *Landis v. Hamilton*, 77 Mo. 554. (2) There was no evidence, whatever, showing or tending to show that Lang and Gray or either of them had any fraudulent purpose in making the assignment, or that Fink had any connection with, knowledge or information of, any fraudulent purpose of assignors, if any there was. *State ex rel. Levi v. Alder*, 97 Mo. 413; *Hausmann v. Hope, supra; Crow v. Beardly*, 68 Mo. 435. (3) The assignment being free from fraud in its inception, no subsequent acts or declarations made by the parties thereto will invalidate it. *Douglass v. Cissna*, 17 Mo. App. 44; *Winn v. Madden*, 18 Mo. App. 261; *Goodwin v. Kerr*, 80 Mo. 276; *Bascom v. Rainwater*, 30 Mo. App. 483. (4) The assignee's possession of the goods at the time of the levy was presumptive evidence of title which was not rebutted by plaintiff. *Vogel v. City of St. Louis*, 13 Mo. App. 116; *State ex rel. v. Hope*, 88 Mo. 430; *Miller v. Marks*, 20 Mo. App. 369; *Phillips v. Shall*, 21 Mo. App. 38. (5) Appellant cannot question Lang's authority to make the assignment on behalf of his firm; his copartner, Gray, is the only one who could raise that issue. *Eppright v. Nickerson*, 78 Mo. 482; *Chew v. Ellingwood*, 86 Mo. 273; *Descombes v. Woods*, 91 Mo. 202; *Hughes v. Ellison*, 5 Mo. 463; *Drake v. Rogers*, 6 Mo. 317; *Hutchinson v. Green*, 91 Mo. 376. Lang's testimony that he had special authority from

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Gray to make the assignment is clear and undoubted. *The Blank & Bro. Candy Co. v. Walker*, 46 Mo. App. 482. (6) The beneficial interest in the property assigned passed to, and vested in, the creditors, on delivery of the deed of assignment. Plaintiff had notice of the assignment before its suit was brought. That the deed was not recorded before the levy was made, makes no difference. *Winn v. Madden, supra; Rosenthal v. Frank*, 37 Mo. App. 272. (7) The assignee expressly accepted the trust and covenanted "to faithfully perform the duties of assignee" by signing the deed. *Roberts v. Moseley*, 51 Mo. 282; *Rindleman v. Willard*, 15 Mo. App. 375, at p. 381. (8) Facts relied upon as an estoppel *in pais* must be specially pleaded. And as plaintiff did not set up in its answer the alleged facts relied upon as an estoppel they will not here be considered. *Miller v Anderson*, 19 Mo. App. 71, at p. 75; *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235, at p. 242.

Gill, J.—On April 16, 1892, the plaintiff plow company commenced an attachment suit against its debtors, Lang & Gray, and had the sheriff levy on a stock of hardware and farming implements at the town of Hale in Carroll county. In due season respondent Fink interpleaded, claiming the goods by virtue of a deed of assignment made and delivered to him by Lang & Gray April 15, the day preceding the attachment. On trial of this issue between the plow company and Fink, the alleged assignee, the jury under a peremptory instruction from the court found for the interpleader, and from a judgment in accordance with the verdict the plaintiff has appealed.

I. It will be seen from the foregoing brief statement that this controversy is between the plaintiff, attaching creditor, and the interpleader, who claims the



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goods under a voluntary assignment executed in point of time prior to the attachment. At the time the sheriff seized the goods the store and its contents were in the exclusive possession of the assignee.

Plaintiffs attacks the assignment, *first*, because it was in fact only executed by Lang, one of the alleged assignors—that Gray, the other partner, did not join in the instrument. This objection is fully met by the showing that Lang, in making the assignment for and in behalf of the firm, acted with full authority from Gray. It seems that Lang lived at Hale, where the firm did business; that Gray resided at St. Charles, Missouri, and that before making the deed of assignment the two partners consulted over the condition of the firm's business and Lang was unquestionably authorized by Gray to make the deed of assignment for the firm. Under the authority, then, of *Blank & Bro. Candy Co. v. Walker*, 46 Mo. App. 482, the assignment was valid. We there held, that, though one partner was not authorized, by virtue of the copartnership relation alone, to make a voluntary assignment for the firm, yet he might do so with the express assent and direction of the other members. More than this, it seems that the plaintiff cannot object to this alleged want of authority in Lang to make the assignment for the firm of Lang & Gray. So long as Gray does not object, creditors have no right to complain. This seems to have been the ruling of the supreme court in *Eppright v. Nickerson*, 78 Mo. 482.

The further point is made that, as the attachment was levied before the deed of assignment was filed for record in the recorder's office, the title had not passed to the interpleader, and that, therefore, plaintiff has a superior right to the assignee. This point, too, must be ruled against the plaintiff. The evidence discloses that the deed of assignment was duly executed on the

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morning of April 15, was delivered to Fink the assignee the afternoon of that day; that he, after affixing his signature and thereby manifesting his acceptance of the trust, went into immediate possession of the stock closed the store and posted a notice on the door—and of all this the plaintiff had full knowledge before suing out the attachment. The assignment then was, as to such creditor with knowledge of the facts complete, and the title as to it was in the assignee. It was so ruled by this court in *Winn v. Madden*, 18 Mo. App. 261.

The further assault made on this assignment because of fraud, we consider without any merit. The only basis for this charge which we can discover from reading the testimony comes from the vacillating conduct of Lang, the assignor, when, at the request of the assignee, he went to Carrollton to place the deed of assignment on record. It seems that after executing the deed and placing Fink in possession of the store, Lang, at Fink's request, went to the county seat to file the instrument in the proper office. On arriving there he was by plaintiff's agent inveigled into some delay; was induced to consider the propriety of making a deed of trust, etc., so that about twenty-four hours was passed before the deed was deposited for record. In the meantime plaintiff's agent took advantage of the delay and sued out the attachment. There was not in all Lang's conduct anything which tended even to show that he was contemplating any fraud or advantage over his creditors. The delay, under the circumstances, all came from suggestions of plaintiff's agent, who was striving apparently to secure an advantage over the other creditors. It was Lang's desire, clearly, to save his property for the joint benefit of all creditors and not permit it to go to the exclusive use of one. In this the law will protect his acts.

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Neither was there any conduct on the part of the assignee that should estop him in making a claim to these goods. The sheriff was not induced to act, or to forego action, because of anything said to him by Fink when he went to Hale to attach the goods. Besides, this is not a question in the case, for the reason that no estoppel was pleaded.

In our opinion there was nothing at the trial that even tended to overthrow this assignment; the court properly directed a verdict for interpleader, and its judgment is therefore affirmed. All concur.

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THE STATE OF MISSOURI, Appellant, v. DANIEL WHITE, Respondent.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Information**: FILING OF COMPLAINT. If an information discloses on its face that it is not made upon "the knowledge, information or belief" of the prosecuting attorney, but upon the complaint, either filed before a justice or delivered to the prosecuting attorney, it must in the one case be founded upon such complaint, and in the other accompanied by it, or otherwise the information should be quashed. (*Per* SMITH, P. J.)

2. ———: ———: PROSECUTING ATTORNEY. The prosecuting attorney holds not only the position of the attorney general or solicitor general of England, by virtue of which he may institute a criminal information at his will, without the oath of himself or the affidavit of a third party, but also the position of the coroner as well, whereby he may file an information at the suggestion or instigation of a private citizen in the shape of an affidavit, such affidavit should contain all matters necessary to criminate the defendant, and should be returned into court with information so that the defendant and the court may see its sufficiency and that the information follows it.

*Appeal from the Sullivan Circuit Court.*—HON. W. W. RUCKER, Judge.

AFFIRMED.

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*B. F. Pierce*, *J. W. Clapp* and *D. M. Wilson* for appellant.

(1) The validity of the information, sufficient in form and substance, and signed by the proper officer, is not affected by appending to it the affidavit of the prosecuting witness. *State v. Zeppenfield*, 12 Mo. App. 573; *State v. Buck*, 43 Mo. App. 443. (2) Where the sworn complaint of one having actual knowledge of the commission of an offense is deposited by him with the prosecuting attorney, it is not necessary for it to accompany the information and be filed with the justice. The prosecuting attorney has the right to retain it in his possession, if he so choose, and a reference to it in the information is sufficient. Revised Statutes, 1889, sec. 4329; *State v. Fletchall*, 31 Mo. App. 297; *State v. Humble*, 34 Mo. App. 343; *State v. Hatfield*, 40 Mo. App. 358. (3) A prosecuting attorney has the constitutional right to file of his own motion an information before a justice of the peace, independent of, and if need be, in opposition to, any statutory requirements. He is the sole judge of what misdemeanors he will prosecute. He is not bound to disclose where he obtains his knowledge. His power remains as at common law and without control; and any act of the legislature that attempts to restrict his rights, or to prescribe the manner of his using them, or that requires him to disclose the source of his knowledge of the commission of a crime is unconstitutional. *State v. Ransberger*, 42 Mo. App. 466; *State v. Fletchall*, 31 Mo. App. 27; *Ex parte Thomas*, 10 Mo. App. 24. (4) If the law, however, requires the affidavit of Robert H. Burrus to be filed with the justice, it is submitted that that requirement has been complied with, within the meaning of the statute. The information has appended to it, the affidavit of Burrus that the facts

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set out in the information are true. That affidavit accompanied the information and was filed with it. The information can, therefore, be well said to be founded on that affidavit, and is a substantial compliance with the statute.

*Jno. M. Swallow* and *Childers Bros.* for respondent.

(1) The motion to quash was aimed at the information. The information was not good at common law, nor under the statute. Revised Statutes, 1889, sec. 4329; *State v. Ransberger*, 106 Mo. 135; *State v. Harris*, 30 Mo. App. 82; *State v. Ristig*, 30 Mo. App. 360; *State v. Hatfield*, 40 Mo. App. 358; *State v. Buck*, 43 Mo. App. 443; *State v. Shaw*, 26 Mo. App. 383; *State v. Davidson*, 44 Mo. App. 513; *State v. Davidson*, 46 Mo. App. 9; *State v. McCarver*, 46 Mo. App. 650; *State v. Webb*, 47 Mo. App. 599. (2) The information shows that it was based on an affidavit; the affidavit indorsed thereon does not charge an offense. No other affidavit was filed with the justice. The justice had no jurisdiction for the reason that the record was incomplete without the affidavit of Burrus. The justice having no jurisdiction, the circuit court could acquire none by appeal. No consent of the party accused can give the justice jurisdiction. 1 Bishop on Criminal Practice [3 Ed.], secs. 316, 893 and 1350. (3) The affidavit made by Burrus and filed with the prosecuting attorney, should have been filed with the justice and made a part of the record. *State v. Harris*, 30 Mo. App. 82; *State v. Shaw*, 26 Mo. App. 383; *State v. McCarver*, 47 Mo. App. 650; *State v. Davidson*, 46 Mo. App. 9; *State v. Foey*, 53 Mo. 336. (4) Section 4329, Revised Statutes, 1889, does not hamper the prosecuting attorney. We think that section, clearly defined, simply means that whenever he has knowledge of the

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commission of an offense, then he basis his information on his own knowledge. But if an affidavit is delivered to him, he makes information, not of his own knowledge, but upon affidavit, and that affidavit must accompany the information. If the information be made of his own knowledge, then there need be no complaint. *State v. Buck*, 43 Mo. App. 443.

SMITH, P. J.—It appears from the record before us that one Burrus made a complaint verified by his oath before a justice of the peace, setting forth that Daniel White had committed an assault and battery, etc., which said complaint was delivered to the prosecuting attorney of Sullivan county, the county where the offense was alleged to have been committed. The prosecuting attorney thereupon filed with a justice of the peace having jurisdiction of the offense, an information charging upon "information, based on the affidavit of Robert H. Burrus, that Daniel White, on the —— day of February, 1893, at Sullivan county, Missouri, on the said Robt. H. Burrus unlawfully did make an assault, and him, the said Burrus, then and there unlawfully did strike, beat, wound and ill-treat, and other wrongs to him, the said Burrus, then and there unlawfully did, against the peace and dignity of the state. B. F. PIERCE,

"Prosecuting Attorney.

"Robert H. Burrus, being duly sworn, says that the facts stated in the within information are true.

"ROBERT BURRUS.

"Subscribed and sworn to before me, this fifth day of April, 1893.

"S. M. GRIGSBY."

The information, it was admitted, was not accompanied by the complaint made by Burrus, nor filed with the justice, but was retained by the prosecuting attorney.

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The defendant, having been convicted on the information before the justice, prosecuted his appeal to the circuit court, where he filed a motion to quash the information, upon the ground that it purported to be based on the affidavit of one Robert Burrus and not on the knowledge, information or belief of the prosecuting attorney; whereas, in fact, no such complaint was filed with the justice before whom the case was pending, as required by law. The motion was sustained by the court and judgment entered accordingly, from which the state has appealed here.

It is thus seen that the single question which we are required to decide is, whether the objection to the information that the prosecuting attorney had not filed therewith the complaint that had been delivered to him was fatal to its validity. It will be further seen by turning to section 4329, Revised Statutes, that it is there provided "that when any person has actual knowledge that an offense has been committed that may be prosecuted by information, he may make complaint verified by his oath or affirmation before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file the same with the justice of the peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or *accompanied by such complaint.*

In *State v. Shaw*, 26 Mo. App. 383, it was held that, unless complaint be filed with the justice or

deposited with the prosecuting attorney, the latter officer cannot file an information unless it be based upon his own knowledge, information or belief. And when such complaint be deposited with the prosecuting attorney, the information when filed must be accompanied by it. This seems to us to be a fair interpretation of the import and meaning of the language of the statute. Any other construction of this statute would render its requirement wholly nugatory. So that if an information disclose on its face that it is not made upon "the knowledge, information or belief" of the prosecuting attorney, but upon the complaint, either filed before a justice or delivered to the prosecuting attorney, it must in the one case be founded on such complaint and in the other accompanied by it.

As to what effect an insufficient complaint would have upon a sufficient information, is a question that does not arise in this case, as the complaint is conceded to be sufficient. But since the complaint, though valid, did not accompany the information as required by statute in such case, we think the circuit court did not err in quashing it.

The judgment will, therefore, be affirmed. All concur.

SEPARATE OPINION.

ELLISON, J.—One of the contentions urged here by the state is, that since, as was decided in *State v. Ransberger*, 42 Mo. App. 466; s. c., 106 Mo. 135, the prosecuting attorney may at his own discretion and will, without oath or affidavit of a third party, file an information against an accused, the fact that an affidavit was made in this case and is referred to in the information may be rejected as mere surplusage, the information being sufficient, as is contended, without an affidavit. It is true that the

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information mentioned in our state constitution is the information of the common law, and as such the prosecuting attorney, occupying, in this respect, the position of the attorney general or solicitor general of England, may institute a criminal information at his will, without the oath of himself or the affidavit of a third party; and so we decided in the case above referred to. This was so well understood in England to be the law that Lord MANSFIELD refused to grant leave to the attorney general to file an information (which he said he applied for out of respect for the court) on the ground that it was a matter lying wholly within the attorney general's discretion, which he should exercise without leave. *Rex v. Phillips*, 4 Burr. 2089; *Rex v. Lucas*, 3 Burr. 1564.

Nothwithstanding this, an information by the attorney general or solicitor general without oath, and at his discretion was not the only information known to the common law. There was also an information "as ancient as the common law itself," filed by the coroner or *master of the crown office* (the standing officer of the general public) in the king's name, though at the relation and upon the affidavit of a private person. 3 Blackstone, 308, 309; Bacon on Informations, *a;* 1 Chitty's Criminal Law, 856, 858; *The King v. Robinson*, 1 Blackstone, 541; *Regem v. Jones*, 1 Strange, 704. Our prosecuting attorneys in respect to criminal prosecutions may be said to perform, not only the duties of the attorney general or solicitor general, but of the coroner or crown officer as well. He may, therefore, file an information at the suggestion or instigation of a private citizen in the shape of an affidavit provided in our statute. When he thus acts upon the affidavit of the citizen the substance of such affidavit should "contain all matters necessary to criminate the defendant." 1 Chitty's Criminal

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Law, 858. And so we decided in *State v. Cornell*, 45 Mo. App. 94, and *State v. Davidson*, 46 Mo. App. 9. This being true, how is it to be known that the affidavit upon which the state's attorney has chosen to base the prosecution, is sufficient unless it be in court? In the case at bar the prosecuting attorney states in the information that it is based upon the affidavit of Robert Burrus, and yet the affidavit itself is not forthcoming, and its sufficiency cannot be known by the defendant or the court. The affidavit, if produced, might fail to show the commission of a crime or misdemeanor; indeed, its allegations might state the party innocent of that with which it attempts to charge him.

The prosecuting attorney for good reason may not desire to exercise his power and discretion to set in motion the machinery of the criminal law without being moved thereto by some complainant on whom the responsibility may rest if the prosecution should prove to be merely the result of mistake or malice or be otherwise ill founded, and on whom the costs may be fastened as is provided in sections 4058, 4063, 4358, Revised Statutes, 1889.

It is therefore clear that when the prosecution attorney chooses to base the information upon the affidavit of an individual, such affidavit must show the information to be well based—must set forth the offense charged—and, that it may seem that this has been done, it must be in court as provided by the statute.

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WILLIAM HARDING, Respondent, v. DANIEL H. MANARD, Appellant.

**Kansas City Court of Appeals, December 4, 1893.**

1. **Appellate Practice:** EVIDENCE: INSTRUCTIONS. Where the two theories of the parties supported by evidence are submitted to the jury on instructions covering in the clearest manner both theories, the appellant is in no condition to complain.

2. **Instructions:** WAGERING CONTRACT. Instructions relating to a sale of hogs and presenting the issue of a wagering contract are set out and approved in the opinion.

3. **Sales:** DELIVERY OF POSSESSION. If the vendor agrees to transfer the absolute property in the thing to the vendee for a money price, the contract is complete and binding, the vendee is entitled to the specific chattel and the vendor to the price; and no actual, manual delivery of possession is necessary.

4. ———: ———: BAILEE. When the goods are in the possession of a bailee, an absolute sale confers an immediate and valid title upon the purchaser without any formal delivery of possession; and the bailee's possession becomes the purchaser's possession.

*Appeal from the Linn Circuit Court.*—HON. G. D. BURGESS, Judge.

AFFIRMED.

*Lander & Johnson* for appellant.

(1) The hog transaction between the parties was a mere wagering agreement. No delivery of the possession or title to the hogs was ever intended under the guise of the contract, to pass from Harding to Manard. The suit is brought for the difference only, between the contract price of $4.10 per hundred "home weights" and the amount the hogs brought in Chicago. Such contracts are void. *Johnson v. Kaune*, 21 Mo. App. 22; *Cockrell v. Thompson*, 85 Mo. 510; *Williams*

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*v. Tiedeman*, 6 Mo. App. 275; *Kent v. Mittenburger*, 13 Mo. App. 507; *Buckingham v. Fitch*, 18 Mo. App. 91; 3 American and English Encyclopedia of Law, Title, Wagering Contracts, bottom page 873, and notes; Tiedeman on Sales, sec. 302, bottom pages 488, 489, and notes. *Crawford v. Spencer*, 92 Mo. 498; *Wright v. Fonda*, 44 Mo. App. 634, 644, 645; *Hayden v. Little*, 35 Mo. App. 418. (2) Respondent's instruction number 1 tells the jury that if $10 earnest money was paid to bind the bargain, then the contract of sale of hogs was valid—wholly ignoring the questions of delivery and manner of settlement, and all other questions involving the validity of the contract relied on. The earnest money of $10 could only take the case out of the statute of frauds; but would not make good a contract void as against public policy. The question of good faith and intention ought to have been submitted to the jury. *Wright v. Fonda*, *supra*. Said instruction given excludes from the jury the points raised on the evidence by the other side; and presents an issue as to earnest money not in dispute. The instructions given for appellant does not cure the error. *Ellis v. Wagner*, 24 Mo. App. 407; *Hayner v. Churchill*, 29 Mo. App. 676; *Singer Company v. Hudson*, 4 Mo. App. 145; *State v. Neuert*, 2 Mo. App. 295; *Raysdon v. Trumbe*, 52 Mo. 35; *Budd v. Hoffaker*, 52 Mo. 297; *Porter v. Harrison*, 52 Mo. 524; *State v. Railroad*, 50 Mo. 472; *Jones v. Jones*, 57 Mo. 138.

*A. W. Mullins* for respondent.

(1) The contract between plaintiff and defendant was legal and valid. The payment of $10 by defendant to plaintiff in part payment of the purchase price of the hogs and to bind the bargain, fulfilled the requirement of the statute (sec. 5187, p. 1258, 2 R. S., 1889), to give validity to the sale. And, in order to

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transfer the title of the property, actual delivery thereof by plaintiff Harding to the defendant Manard was not essentially necessary. Tiedeman on Sales, sec. 84; *Hamilton v. Clark*, 25 Mo. App. 428; *Nance v. Metcalf*, 19 Mo. App. 183; *Martin v. Ashland Mill Co.*, 49 Mo. App. 29; *Erwin v. Arthur*, 61 Mo. 386; *Williams v. Evans' Adm'r*, 39 Mo. 201; *Cunningham v. Ashbrook*, 20 Mo. 553; *Lansing v. Turner*, 2 Johns. 13, 16. (2) Plaintiff had placed his stock in charge of J. J. Botts for shipment and who in his own name had forwarded them by railroad for the Chicago market. Under these circumstances the plaintiff sold the hogs to defendant. The well settled rule of law is that: "When the goods are in the possession of a bailee or agent of the seller, a completed or absolute sale confers an immediate and valid title to the purchaser without any formal delivery of the possession; the possession of the bailee or agent then becomes that of the purchaser, and operates not merely as a transfer of a right of action, but of the goods themselves." *Erwin v. Arthur, supra; Allgear v. Walsh*, 24 Mo. App. 134, 144; *Worley ex rel. v. Watson*, 22 Mo. App. 546, 552, 553; *Williams v. Evans' Adm'r, supra.*

Gill, J.—Defendant Manard has appealed to this court from a judgment against him for $70.38, an alleged balance due plaintiff Harding on a sale of one hundred and seventeen hogs. The evidence discloses about this state of facts: On the evening of April 4, 1892, Harding, who was a Linn county farmer, brought the hogs to Meadville and the same were shipped to Chicago in the name of Botts a regular dealer and shipper of stock. On April 6, while the hogs were in transit, Manard agreed with Harding for the purchase of the hogs at the rate of $4.10 per hundred, according to their weight at point of shipment, less whatever the

hogs might be "docked" at Chicago, and defendant paid $10 to bind the bargain. It was agreed that Botts should dispose of the hogs at Chicago and account to Manard for the proceeds. Botts was immediately informed of Manard's purchase and of his duty to turn over the proceeds to Manard. When the hogs were sold in Chicago, Botts did account to Manard, and by Manard's direction the net amount received from the Chicago sale was paid over to Harding. The aggregate weight of the hogs at the place of shipping, less eighty pounds "dockage" at Chicago, was sixteen thousand, three hundred and seventy-five pounds. This multiplied by the agreed price of $4.10 per hundred amounted to $671.37. Deducting from this the $10 advanced and the Chicago draft of $590.99, which, by order of Manard, Botts had turned over to Harding, left a balance due the plaintiff of $70.38, which defendant refused to pay and for which this suit was brought with the result above stated.

The defendant seeks to escape liability on the charge that the agreement had between him and the plaintiff was a wagering contract, and such as the courts will not enforce. It is claimed by Manard that it was not the intention of Harding and himself, of the one to sell, and the other to buy, the car load of hogs, but that it was a mere gambling on the fluctuation of the market at Chicago.

Admitting now that there was some evidence to sustain defendant's contention, and yet he is in no condition to complain here. The two theories, to-wit, of actual bargain and sale of the hogs as is claimed by Harding, or that it was a mere wagering agreement, as asserted by Manard, were, on instructions sufficiently favorable to the defendant, submitted to the jury, and they have found for the plaintiff. The court gave two instructions, covering in the clearest manner both

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theories. The jury were told, in the first place, that if they found that on April 6, 1892, the plaintiff contracted and sold to the defendant a car load of hogs which plaintiff had shipped to Chicago at the price of $4.10 per hundred, according to the weight at Meadville (where they were shipped); that defendant paid at the time of the contract $10 to bind the bargain, and agreed to pay the remainder of said contract price thereafter; but that defendant had failed and refused so to do to the extent and amount of $70.38, then the jury should find for the plaintiff for said amount. And to cover defendant's theory of the case the court further told the jury, "that although the alleged contract between plaintiff and defendant was apparently, on its face, for the purchase of the hogs at the price of $4.10 per hundred pounds; yet, if they further find from all the evidence that the trade, in reality, was by the parties intended to be only a speculation in the price of the hogs in the Chicago market; and that both parties understood and intended, at the time of making the alleged contract, that the plaintiff was not to deliver, nor defendant to receive, the possession of the hogs; but that the hogs should be sold in Chicago by plaintiff's commission man, and that the parties should then settle the transaction by the payment, the one to the other, of the difference between the net price for which the hogs should be sold in Chicago, and the $4.10 per hundred pounds, or that the defendant should pay plaintiff such difference in case said hogs should net less than the $4.10 per hundred pounds, and further find from the evidence that the sum claimed in this action is for such difference, then the plaintiff cannot recover, and the verdict must be for the defendant."

This last instruction was most favorable for the defendant. It presented for decision every fact upon

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which defendant could ground a defense. No actual manual delivery of the hogs to the defendant was necessary to the transfer of title as between the contracting parties. If the vendor agrees with the vendee to transfer the absolute property in the thing to the vendee for a money price, the contract is complete and binding on the parties. The vendee becomes entitled to the specific chattel, and the vendor has a right to the price agreed upon. *Nance v. Metcalf*, 19 Mo. App. 183; *Hamilton v. Clark*, 25 Mo. App. 436; Tiedeman on Sales, sec. 84.

And again, as was said in *Erwin v. Arthur*, 61 Mo. 387: "When the goods are in the possession of the bailee or agent of the seller, a complete or absolute sale confers an immediate and valid title to the purchaser without any formal delivery of the possession The possession of the bailee or agent then becomes that of the purchaser, and operates not merely as a transfer of a right of action, but of the goods themselves." Hence it follows that when Harding and Manard agreed upon terms of sale of hogs, which were then in possession of Botts (Harding's bailee or agent), there was an immediate transfer of title, and Botts' possession became that of the vendee, Manard.

This cause seems to have been fairly tried; the verdict and judgment finds ample support in the evidence, and we will not, therefore, disturb it. Judgment affirmed. All concur.



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EDGAR F. ATWOOD, Respondent, v. MARY A. ATWOOD, Appellant.

**Kansas City Court of Appeals, December 4, 1893.**

1. Trial **Practice:** ORDER OF PUBLICATION: AFFIDAVIT: PRESUMPTION. When a court of general jurisdiction has jurisdiction over the subject-matter, it will be presumed that in acquiring jurisdiction over the person it has acted correctly; and an order of publication reciting that "it appearing to the satisfaction of the clerk that defendant was a nonresident," a sufficient affidavit will be presumed.

2. Record: CONTRADICTION OF: PAROL EVIDENCE. Though the recital of a thing or matter of fact in a record, order or judgment will not control in the face of the thing itself, which being produced shows the contrary, yet in the absence of such production, the record cannot be contradicted by a witness' memory of the contents of the absent paper.

*Appeal from the Buchanan District Court.*—HON. A. M. WOODSON, Judge.

AFFIRMED.

*Vories & Vories* for appellant.

(1) It is necessary that order of publication should state grounds upon which it is based. Wade on Notice [2 Ed.], sec, 1055; Patteson's Missouri Form Book, sec. 182. (2) In all cases where constructive service is had in lieu of that which is personal, there must be a strict compliance with statutory provisions and conditions. *Schell v. Leland*, 45 Mo. 292; *Palmer v. McMaster*, 33 Pac. Rep. 132; Brown on Jurisdictions, sec. 51; *Charles v. Morrow*, 99 Mo. 638, and cases cited; *Galpin v. Page*, 18 Wall. 350. *Settlemeir v. Sullivan*, 97 U. S. 449. (3) The recitals in order of publication, "It appearing to the satisfaction of the

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clerk the defendant is a nonresident, etc.,'' raises the presumption that legal evidence of nonresidency was produced; but when the entire record proves to the contrary, the presumption is overcome and the proceeding void. *Manning v. Heady*, 64 Wis. 634; *Neuman v. Cincinnati*, 18 Ohio, 331. (4) It will hardly be claimed that either petition or affidavit stated facts sufficient to obtain order of publication on grounds of nonresidence, and this being so, there being nothing to sustain order, decree is void. *Higgins v. Beckwith*, 102 Mo. 462. (5) As the recital of personal service in judgment or decree may be overthrown, and is controlled by the return of service made by sheriff, so the recital in decree of publication is controlled by order of publication itself, and the recital in order of publication is conclusive as to grounds of publication, as much so as recitals of personal service by sheriff. *Cloud v. Inhabitants*, 86 Mo. 357; *Adams v. Cowles*, 95 Mo. 501. As to return by sheriff. *Heath v. Railroad*, 83 Mo. 617; *Decker v. Armstrong*, 87 Mo. 316. Affidavit must conform to and support order of publication. *Palmer v. McMaster*, 33 Pac. Rep. 132; Brown on Jurisdiction of Courts, sec. 51 and others.

*Sherwood & Allen* for respondent.

(1) The first assignment of error cannot be sustained. If witness Martin's evidence was competent, of course no complaint can be made. If witness Martin's evidence was incompetent, still the court, sitting as a court of equity, did not err in not excluding it. *Davis v. Kline*, 96 Mo. 401; *Bush v. Arnold*, 50 Mo. App. 8. (2) If not concluded by decree and statutes, if the decree is impeached, it must be impeached by the record. Evidence *dehors* the record will not do in a divorce judgment in this state, on a

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motion to vacate. *Childs v. Childs*, 11 Mo. App. 398. Silence in the record, with respect to this affidavit, does not impeach the decree, even if not a divorce judgment. *St. Louis v. Lanigan*, 97 Mo. 179, cited and approved in case of *Leonard v. Sparks*, 22 S. W. Rep. (Mo.) 902. *Gates v. Tusten*, 89 Mo. 18; *Peacock v. Bell*, 1 Saunders, 74; *Foot v. Stevens*, 17 Wend. 486; *Cloud v. Pierce City*, 86 Mo. 367; *Smith v. Smith*, 48 Mo. App. 612. Oral testimony will not do to impeach a decree of divorce. *Childs v. Childs*, *supra*; *Bascom v. Bascom*, 7 Ohio Rep. part 2, 126. The modern rule is one of more confidence in the trial court. *Leonard v. Sparks*, 22 S. W. Rep. (Mo.) 899; *State v. Dugan*, 110 Mo. 138; 2 Bishop on Marriage, Divorce and Separation, sec. 589; *St. Louis v. Lanigan*, *supra*; *Gates v. Tusten*, *supra*. (3) The testimony of witness S. M. Carson clerk, fails to prove or disprove anything, even if competent evidence in this case. The evidence must be clear and conclusive. 2 Bishop on Marriage, Divorce and Separation, sec. 1561.

ELLISON, J.—Defendant filed a motion to set aside and vacate a decree of divorce rendered in plaintiff's favor against her. The motion was heard by the court and overruled. Defendant appeals.

It appears that the divorce was granted near two years prior to filing this motion, and that in the meantime plaintiff had again married. It further appeared that defendant knew nothing of the divorce proceedings until shortly before filing her motion.

The judgment of divorce was founded upon a good and sufficient petition. The service was by order of publication. The petition itself was silent as to the defendant being a nonresident, or being beyond the reach of ordinary process. An order of publication was made by the clerk of the circuit court for Buchanan

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county in vacation. The order as entered by the clerk stated that: "It appearing to the satisfaction of the clerk of this court that said defendant, Mary A. Atwood, is a nonresident of the state of Missouri, and does not reside therein, it is ordered that said nonresident defendant be notified by publication, as required by law, that said plaintiff has commenced his suit," etc. A proof of publication, in accordance with the order, was shown to be with the record files. The decree itself was silent as to such proof. No affidavit for order of publication was found upon the record books or among the papers in the cause. The clerk stated in testimony that the petition and order of publication he believed to be the only papers filed in the cause, though there might have been an affidavit filed and afterwards lost; that he had no personal recollection of the matter, and only testified from the records produced, and his custom and manner of performing his duties as clerk. The attorney who acted for plaintiff in obtaining his divorce was introduced as a witness, and testified that he wrote, and saw plaintiff swear to, an affidavit for order of publication before the clerk; that the affidavit stated, in substance, as ground for the order, that the defendant "had concealed herself from his knowledge in such a way that it would be impossible to get legal process upon her."

The point of attack on the decree is, that there was no affidavit authorizing the order of publication we have recited above, and that, therefore, the court rendering the decree was without jurisdiction of defendant.

The fact that no affidavit was found upon the record, or among the papers, is not conclusive, by any means, in an attack upon a judgment depending upon such affidavit for its validity, that none had ever been filed. When a court of general jurisdiction has jurisdiction over the subject matter, it will be presumed

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that in the matter of acquiring jurisdiction over the person, it has acted correctly. As, "if a statute require a certain affidavit to be filed prior to the rendition of judgment, it will be presumed, in the absence of any statement or showing upon the subject, that such affidavit was filed." Freeman on Judgments, sec. 124. This was quoted, with approval, by BLACK, J., in *Adams v. Cowles*, 95 Mo. 501, a case where no affidavit for an order of publication was shown by the record. In this case the order of publication leaves the inference that an affidavit was filed; it recites that, "it appearing to the satisfaction of the clerk of this court, that defendant was a nonresident of the state of Missouri." Besides, "when an official act is shown to have been done in a manner substantially regular, formal requisites for the validity of the act are constantly presumed." *Adams v. Cowles, supra.* The foregoing would dispose of defendant's case as made out by her.

But it may be claimed that an affidavit was shown to have been made, and that it was insufficient to support the order, in that it alleged concealment so as to prevent the service of process, whereas the order recites nonresidence. It is true that it may be affirmed as a proposition that the recital of a thing or matter of fact in a record, order or judgment, will not control in the face of the thing itself, which, being produced, shows the contrary. But in this case the affidavit itself was not produced. Only the testimony of a witness as to what he could recollect of the affidavit. This the court held, in determining the fact, to be insufficient, and we see no ground for interfering with that conclusion. Some points are made as to the court's action in admitting testimony, but to which no exception was saved.

We are of the opinion that the trial court made a proper disposition of the motion, and we will affirm the judgment. All concur.

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## J. H. Holschen, Appellant, v. Frank Fehlig, Respondent.

**St. Louis Court of Appeals, December 5, 1893.**

**The Evidence in this cause is considered, and is *held* not to indisputably establish a right on the part of the plaintiff to recover.**

*Appeal from the St. Louis City Circuit Court.*—Hon. J. A. Harrison, Special Judge.

Affirmed.

*Robert L. McLaran* for appellant.

*C. A. Schnake* for respondent.

Rombauer, P. J.—The plaintiff, who is a real estate agent, sued the defendant for commissions which he claimed to have earned in the sale of defendant's house. The court tried the cause without a jury and rendered a judgment for the defendant. The plaintiff assigns for *sole* error in this court that "there was no substantial evidence to support the judgment."

The burden of proof in this case was with the plaintiff; hence an assignment of error, that "there was no substantial evidence to support a judgment *for the defendant*," involves a contradiction in terms. We have, however, treated the assignment as if it intended to charge that the plaintiff was entitled to recover on the undisputed facts. With that view, we have read over the evidence, and find that the facts are contro-

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verted throughout. The plaintiff gave evidence tending to show that he was the procuring cause of the sale. The defendant gave evidence tending to show that not the plaintiff, but a third person, was the cause; and, moreover, that the defendant had paid commissions to such third person upon plaintiff's disclaimer of them. It must be evident that the finding of the trial court in that state of the record cannot be disturbed, and that no question of law is presented for our consideration on this appeal.

All the judges concurring, the judgment is affirmed.

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JULIUS WEIL, Appellant, v. W. G. WILLARD, Respondent.

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**St. Louis Court of Appeals, December 5, 1893.**

**Statute of Frauds**: MEMORANDUM OF SALE OF LAND: SUPPLYING DEFICIENCY BY PAROL EVIDENCE. The memorandum of a contract for the sale of land is insufficient under the statute of frauds, if the land cannot be identified from its terms, aided by its references to external standards of description. To have the effect of identification, the external standard thus referred to must have been known or existing at, or before, the making of the contract; a provision merely for future occupancy will not suffice. Nor can the failure of the memorandum to thus definitely locate the land be obviated by parol evidence.

*Appeal from the St. Louis City Circuit Court.*—HON. J. A. HARRISON, Special Judge.

AFFIRMED.

*Sale & Sale* for appellant.

*R. B. Meriwether* for respondent.

BOND, J.—This action is for a breach of the following contract executed between the parties hereto, to-wit:

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"St. Louis, May 18, 1892.

"Received of W. G. Willard the sum of $50 in part payment for a certain parcel of improved property lying in city block number 258, and having a front of twenty-nine feet on the east side of Tenth street by a depth of one hundred and thirty-two feet, six inches, which property is this day sold to him for the total sum of $4,700, payable on terms of $1,000 in cash, and the remainder in one year, with interest at five per cent. per annum, payable annually, said deferred payments to be secured by deed of trust. It is agreed by and between the undersigned that the title to said property is perfect and will be conveyed free from liens and incumbrances, except as to taxes for the year 1892, which the undersigned purchaser agrees to pay. If, upon examination, the title proves to be defective and can not be made good within a reasonable time, the sale shall be off and the earnest money returned.

"Agreed that Julius Weil have privilege to occupy said premises for the period of four months or less, at $30 per month rent, up to the time used.

"The said W. G. Willard is accorded twenty-five days time from this date in which to have the title investigated.

"Signed and sealed in duplicate by the parties hereto.

Wm. G. Willard. [seal]

"Julius Weil. [seal]"

The appellant alleges tender of performance of said contract on his part, and refusal by the respondent to accept such performance, whereupon the appellant asked for damages in the sum of $750.

The answer of respondent was, *first*, a general denial; *secondly*, a plea of the statute of frauds.

The case was tried without a jury. The court gave judgment sustaining the defense of the statute, from which an appeal was taken. The only error assigned

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is the action of the court in holding the contract sued on insufficient under the statute of frauds.

The statute in question invalidates all sales of land, "unless the agreement * * * or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith." Revised Statutes, 1889, sec. 5186. The rule of construction of this language is expressed by the supreme court in the following terms.

"All the authorities are agreed that the memorandum must state the contract with reasonable certainty, so that its essential terms can be ascertained from the writing itself without a resort to parol evidence." *Ringer v. Holtzclaw*, 112 Mo. 522.

Accordingly, the law is that contracts required by the statute to be in writing, unlike other written contracts, can not, when *incomplete on their face*, be aided or completed by parol evidence. The reason of the distinction is that contracts not required to be in writing would be good, if resting altogether in parol. Therefore, when it is apparent that a *part only* of such contracts have been reduced to writing, no rule of law is contravened by the reception of parol evidence of the remainder. On the other hand, if the contract is one within the statute of frauds, and the agreement or memorandum is incomplete or deficient as to any essential part thereof, parol evidence can not be received to supply the omission, for this would nullify the terms of the statute. *Ringer v. Holtzclaw*, 112 Mo. 523; *Miller v. Goodrich Bros. Banking Co.*, 53 Mo. App. 430; *Rucker v. Harrington*, 52 Mo. App. 481.

The only question made in this case is as to the sufficiency of the description of the property contained in the contract. The descriptive words are as follows: "A certain parcel of improved property lying in city block, number 258, and having a front of twenty-nine

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feet on the east side of Tenth street by a depth of one hundred and thirty-two feet and six inches." This description gives the frontage, depth, the side of the street and the city block of an improved lot. It does not give the width of the entire lot, nor its location in the block, nor its boundaries, nor its point of beginning, nor the city or state wherein it is situated, unless these may be inferred from the dating at the head of the contract, to-wit, St. Louis, May 18, 1892.

A valid contract for the sale of land must so describe it that it may be identified, or must refer to some "external standard" of description, whereby it can be identified by extrinsic evidence. *Fox v. Courtney*, 111 Mo. 150; *Smith v. Shell*, 82 Mo. 215; *Shroeder v. Taaffe*, 11 Mo. App. 267, affirming *King v. Wood*, 7 Mo. 389; *Briggs v. Munchon*, 56 Mo. 474; *Springer v. Kleinsorge*, 83 Mo. 152.

We do not understand appellant to claim that the description, *supra*, of the land sold *by its terms* identifies the land. But the contention is that in another clause of the contract there is a reference to an external matter, sufficient to describe and identify the land. This clause is, to-wit: "Agreed that said Julius Weil have privilege to occupy said premises for the period of four months or less, at $30 per month rent, up to time used."

This clause does not in terms refer to an occupancy of the lot in question as a residence by Julius Weil before the making of the contract *supra*. Nor does it state whether he is in the future to occupy it as a residence or a place of business. It merely says, in substance, that he is to pay $30 per month for the occupancy thereafter of the lot sold to the respondent. This adds no new feature to the previous description of the lot set forth in the contract. A reference in the contract to its future occupancy cannot afford an

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external standard whereby to identify the boundaries or location of the lot of ground *at the time* of the making of the contract. In order to have the effect of identifying the land sold, the external matters referred to for that purpose must be in themselves sufficiently definite, and must have been known and existing at and before the making of the contract. The clause under consideration is incomplete and deficient in not stating in effect that the lot sold was the one whereon Julius Weil *then* resided, or used in carrying on a *particular* and known business at *the time* of its sale. The omission of these or other equivalent statements was the omission of essential matter of description by external reference, and cannot be cured by parol evidence. We have seen that contracts required by the statute of fraud to be in writing cannot be pieced out by parol as to essential statements omitted therefrom. See cases cited *supra*. As is said by the supreme court: "The description cannot be supplied altogether by parol. The writing must be a guide to find the land—must contain sufficient particulars to point out and distinguish the tract from any other." *Fox v. Courtney*, *supra*.

The decided bent of judicial opinion in this state is to uphold the statute of frauds. This purpose has been subserved by the recent overruling of two cases of a contrary tendency. *Ringer v. Holtzclaw*, 112 Mo. 523; *Withnell v. Petzold*, 104 Mo. 409.

We do not think there is either such a direct description of the lot sold in the contract, or such a reference therein to external matters, as would "point out and distinguish the tract from any other." We, therefore, affirm the judgment of the trial court. All concur.

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LOUIS G. BURRIS, Respondent, v. SHREWSBURY PARK LAND AND IMPROVEMENT COMPANY, Appellant.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Contracts:** RIGHT OF RESCISSION. The breach of a contract will not warrant the rescission thereof by a party, if it was occasioned by his own default.

2. ———: INDEPENDENT CONTRACTS. When a contract requires a payment to be made at a time which may happen before a certain covenant of the payee is to be performed, such covenant and that for the payment are independent covenants.

3. **Practice, Appellate:** JUDGMENT ON AGREED STATEMENT OF FACTS. When a cause is submitted to the trial court on an agreed statement of facts, and the proper judgment thereon is a mere conclusion of law, it is the duty of this court to render such judgment as the trial court should have rendered, if that of the trial court is found erroneous.

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*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

*J. M. Holmes* for appellant.

(1) A mere threat of noncompliance by one party, before the time for compliance on his part is reached, will not relieve the other party from a performance or tender of performance of his portion of the contract, when such performance is a condition precedent to such compliance. *Daniels v. Newton*, 114 Mass. 530. (2) Plaintiff had no right to demand a deed without tendering notes secured by deed of trust for payments to fall due under the term of the contract. *Campbell v. Gittings*, 19 Ohio, 347; *Williams v. Healey*, 3 Denio, 363; *Gazley v. Price*, 16 Johns. 267; *Dunham v. Petter*, 4 Seld. 308; *Lester v. Jewet*, 1 Kan. 453; *Turner v. Mellier*, 59 Mo. 526.

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*Pollard & Mott* for respondent.

(1) Before appellant could rightfully forfeit the contract, it must have executed and delivered, or offered to execute and deliver, the warranty deed, thereby placing respondent in default. And this is true, whether the covenants be construed as dependent or independent. This, appellant never did. *Gerrard v. Macey*, 10 Mo. 161; *Rector v. Purday*, 1 Mo. 131; *Lucas v. Clemens*, 7 Mo. 367; *Grant v. Johnston*, 5 N. Y. 247; *Leonard v. Bates*, 1 Black, 172; *Kane v. Hood*, 13 Pick. 281. (2) Appellant's notification on April 20, that the contract was at an end and *a fortiori* its refusal, on April 29, to execute the warranty deed, when respondent offered to execute and deliver the notes and deed of trust, and its further notification, at that time, that it had forfeited the contract, and that respondent had no further rights under it, was a renunciation of the contract, and gave respondent the right to treat it as at an end, and sue for a breach or to recover the money paid. *Norrington v. Wright*, 115 U. S. 188; *Johnston v. Milling Co.*, 16 Q. B. Div. 460; *American Life Ins. Co. v. McAden*, 109 Pa. St. 39; *Frost v. Knight*, L. R. 7 Ex. 112; 3 American and English Encyclopedia of Law, p. 904. (3) It was not necessary for respondent to actually produce the notes and deed of trust. It was only necessary for him to show an offer to perform, and a refusal by appellant to comply with its covenant. *Price v. Vanstone*, 40 Mo. App. 207; Benjamin on Sales, sec. 592; *Ibid*, Bennett's Notes, p. 559; *Garred v. Doniphan*, 10 Mo. 161; *Denny v. Kile*, 16 Mo. 450; *Turner v. Mellier*, 59 Mo. 526. (4) Appellant's covenant to make sidewalk and plant a double row of trees should have been performed within a reasonable time; from November 24, 1890, to April 24, 1892, was an unreasonable time under the circumstances.

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Bond, J.—This suit was begun before a justice of the peace to recover $110, paid by respondent under the agreement hereinafter set forth, which was alleged to have been broken by appellant.

The parts of the agreement (exhibit A) between the parties to this suit, which bear upon their rights, are as follows:

"This is to certify that the Shrewsbury Park Land and Improvement Company, a corporation, has, this twenty-fourth day of November, 1890, sold to Louis G. Burris, for the sum of four hundred (400) dollars, lot number ten (10), block twenty-three (23), in fourth subdivision of said park, in St. Louis county, Missouri, upon the following terms: Cash paid at this time ten (10) dollars, receipt of which is hereby acknowledged, and the remainder, three hundred and ninety (390) dollars, to be paid as follows, to-wit:

"The sum of ten (10) dollars on the twenty-fourth day of each month thereafter at the office of this company until one hundred (100) dollars has been paid, at which time said company will execute a sufficient general warranty deed, conveying said property to the said purchaser; and he agrees to execute to said company thirty (30) notes for the deferred payments, each for the sum of ten (10) dollars, payable monthly thereafter, and secured by a deed of trust, in the usual form, on said property. Said warranty deed to contain the following provisions, intended for the protection of the purchaser. (Here follow certain clauses not necessary to be set out.)

"Said Shrewsbury Park Land and Improvement Company hereby agrees at its own expense to pave streets in front of said property with good substantial macadam and gravel; also to make sidewalks and to plant a double row of good trees.

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"It is agreed that, if the purchaser shall not faithfully comply with the provisions of this contract, after the lapse of sixty days from such failure this contract shall become null and void without notice, unless a further extension is obtained from an officer of the company in writing, and that time shall be the essence of this contract."

The trial of the case was had in the circuit court upon an agreed statement of facts, viz.:

"It is stipulated and agreed that the following facts are to be taken as admitted in the above cause, and the said cause is submitted upon this agreed statement and the petition and pleadings filed in the justice court.

"That plaintiff and defendant duly entered into the agreement hereto attached and marked exhibit "A" (contract *supra).*

"That plaintiff, in pursuance of the terms of said agreement by him to be performed, paid defendant the sum of $10 for each and every month after the date of said agreement upon the twenty-fourth day thereof, until plaintiff had paid and defendant had received the sum of $100 in addition to the sum of $10 paid by plaintiff, the receipt of which last sum is acknowledged by defendant in said exhibit "A," the last payment being September 24, 1891.

"That, on the eighteenth day of October, 1891, plaintiff sent to Mr. Gorman, agent of defendant, the following letter:

'ST. LOUIS, October 18, 1891.

'*Mr. J. E. Gorman:*

'DEAR SIR:—I am afraid I will not be able to keep up my payment on lot. Is there any way I can get at least part of the money back that I have paid in on it? Do you think the company would pay me half what I

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have paid in, and take it off my hands? Please see what you can do about this matter, and let me know.

'Yours respectfully,

'L. G. Burris, 923 N. 19th St.'

"That on or about the tenth day of April, 1892, defendant notified plaintiff that he was in default of his payments under said exhibit "A," and that unless he continued said payments, it would declare said exhibit "A" forfeited, and that all and singular the several sums of money paid by him thereon would become the property of defendant absolutely.

"That on or about the twentieth day of April, 1892, defendant told plaintiff that the agreement, marked exhibit "A," had been declared forfeited by defendant, and that the several sums of money paid by plaintiff to it became thereby the property of defendant, who refused to return the same or any part thereof to plaintiff.

"That on or about April 29, 1892, plaintiff demanded of defendant that it execute and deliver to him a sufficient general warranty deed conveying the premises described in exhibit "A," and that plaintiff notified defendant that he stood ready, willing and able to execute and deliver on his part to defendant twenty-nine notes of $10 each for deferred payments, payable monthly thereafter, and that he would duly execute and deliver to defendant a deed of trust, in the usual form, on said property, securing said notes, all in conformity with the requirements imposed upon him by said exhibit "A," but did not produce or tender such deed or notes. That defendant then notified him that it had long before that declared the said exhibit "A," forfeited, and that plaintiff had no rights thereunder, and that it refused to execute and deliver said warranty deed so demanded by plaintiff. Plaintiff thereupon demanded of defendant a return of the said



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several sums of money paid by him to it, which defendant refused to do either in whole or in part.

"That plaintiff on said twenty-ninth day of April, 1892, demanded that defendant make sidewalks, and plant a double row of trees in front of said lot as agreed by the terms of exhibit "A," which defendant refused to do, the fact being at that date that the street in front of said lot was paved with good and substantial macadam and gravel, as required by the terms of the contract, but the sidewalk was not laid nor were the trees planted. That at the time of said demand there was no house on the street on which the said lot fronted beyond said lot, and that said lot itself was vacant.

"That said sidewalk since the institution of this suit has been laid and said double row of trees planted.

"That defendant at no time prior to the institution of this suit ever executed and tendered to plaintiff a deed for the property mentioned in exhibit "A."

"That defendant did at the trial of this cause in the justice court tender a good and sufficient warranty deed to the property described in exhibit "A," and tendered for his execution notes for the payments called for by the terms of exhibit "A," which had not been paid, together with a deed of trust, in the usual form, securing the same, but plaintiff refused to accept said deed or execute said notes and deed of trust."

This case having been tried upon an agreed state of facts, it is our duty to apply the conclusions of the law as if the facts stated had been found by a special verdict. *South Missouri Land Co. v. Combs*, 53 Mo. App. 298.

The cause of action filed by respondent before the justice set forth the contract between the parties for the sale of a lot of ground, *supra*, alleging performance

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by the respondent of all the provisions, etc., of the contract, and, futher, a demand of a deed and tender of notes and trust deed by the respondent, and failure of the appellant to comply with said demand, and also nonperformance on its part of other terms of the contract, and a declaration by defendant on April 29, 1892, of a forfeiture to itself of payments made by the respondent; wherefore respondent prayed for judgment for said sums paid by him under said contract.

It is obvious that the respondent's action is predicated on the assumption that the contract described in his petition was rescinded, and that he was therefore entitled to recover back the money paid thereunder. Contracts under seal may be rescinded by an *executed* parol agreement, or by an executory parol agreement, provided the latter is founded upon a consideration. *Lancaster v. Elliott, ante p.* 249; *Pratt v. Morrow,* 45 Mo. 404. Neither of these methods of rescission was adopted in this case. The only grounds alleged by respondent in support of his theory of a rescission of the contract are: *First.* That on April 29, 1892, he demanded a deed and offered his notes and trust deed therefor, and that the same was refused by appelant. *Second.* That the appellant declared the contract forfeited on April 20, 1892, and appropriated the payments made theretofore by the respondent under claim of a right to forfeit said contract. *Third.* That appellant unreasonably delayed compliance with its contract obligation to make streets and sidewalks and plant trees.

It is perfectly plain that, after the payment of ten of the eleven installments of the purchase money, the respondent was entitled to demand a deed to the lot, and was bound to execute for it his notes and deed of trust as prescribed in his contract. Nor did it affect his obligation in this respect whether it was the duty of

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appellant to offer the deed in the first instance, or to await his demand. In either case he could not have gotten the deed without giving his notes, and his trust deed on the lot for the unpaid purchase money. This was a *condition concurrent* with his right to a delivery of the deed.

To have recovered in an action for breach of appellant's contract to give a deed, it would have been essential for respondent to show that he performed or offered to perform all the *simultaneous conditions* imposed on him by the agreement. The same principle applies to a rescission of contracts. A party can not rescind, if the breach is occasioned by his own fault.

In the case at bar the evidence is that the respondent, on April 29, 1892, offered to accept a deed from the appellant for the lot, and to give therefor his (respondent's) twenty-nine notes, due monthly thereafter, secured by a deed of trust on the land. It also is that, when this proffer was made by respondent, he was in arrears of his monthly payments for several months, which arrears he did not offer to pay, but proposed to give his notes for the same due monthly thereafter. It also is that, when this offer was made by the respondent, he had been notified of a forfeiture of his contract by appellant because of his nonpayments, under the contract, for more than sixty days.

Under these circumstances we hold that the respondent did not tender a discharge of his covenant, nor a compliance with his contract. He could not do that by *continuing* his default as to nonpayment of past due monthly installments. At best, to have constituted a compliance with his covenant and contract, he should have offered payment in cash for all past delinquencies, and his notes for future payments, duly secured by a

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trust deed on the land. The appellant was therefore warranted in declining this offer of April 29, 1892, because it was not a full or sufficient tender or offer to perform the contract.

II. For argument's sake we will grant that the forfeiture attempted to be declared by appellant on April 20, 1892, was not preclusive of the respondent's right to perform his contract. The question still is: Did it become, under the proof in this case, the ground of a right in the respondent to treat the contract as rescinded, and to sue for the money paid thereunder? The agreed statement of facts shows that the forfeiture was *only declared* many months after respondent had written the appellant that he (respondent) feared he would be unable to make his *monthly* payments, as required in his contract, and after he had thereafter, up to the time of the attempted forfeiture, failed to make *any* monthly payments. The contract, by express provision, made it his duty to pay promptly each month the sum of ten dollars under penalty of a forfeiture. Even if the forfeiture so declared by the appellant was nugatory, still it was caused by the respondent's act of nonpayment and violation of his contract, and can not, therefore, be relied upon by him as a rescission. *Alden v. Goddard*, 73 Me. 345.

III. The clause in the contract obligating appellant to plant trees and lay sidewalks is, by the terms of the agreement, an independent covenant, not a condition subsequent. For failure to perform this covenant within a reasonable time, the covenantee might sue for its breach, but he could not for such failure *rescind* the contract. The rule as to the character of the covenants in a contract is, that, when payment is required from one at a time, which may happen before the covenant of another is to be per-

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formed, the latter covenant is independent. *Seers v. Fowler*, 2 Johns. 272; *Couch v. Ingersoll*, 2 Pick. 300; *McCoy's Adm'rs v. Bixbee's Adm'rs*, 6 Ohio, 312; *Taylor v. Rhea*, Minor (Ala.) 414.

Whatever remedy the plaintiff has lies in enforcing, and not in rescinding, the contract. *O'Fallon v. Kennerly*, 45 Mo. 125; *Melton v. Smith*, 65 Mo. 315; Bispham on Equity, sec. 363.

As this case was submitted on an agreed statement of facts and the proper judgment thereon is a mere conclusion of law, it is our duty to render such judgment as the trial court should have rendered. The judgment is reversed and the cause remanded to the trial court with directions to enter a judgment for defendant.

All the judges concur.

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JOHN LEE AND ELIZABETH LEE, Respondents, v. PUBLISHERS, GEORGE KNAPP & COMPANY, Appellant.

St. Louis Court of Appeals, December 5, 1893.

1. **Negligence**: LAW AND FACT. When the evidence in an action at law is conflicting, or warrants the deduction of different rational inferences, it is the province solely of the jury to reconcile it, or to determine which of these inferences is to be drawn from it. This rule is applied in this cause to issues in regard to the existence of negligence.

2. ———: INSTRUCTION AS TO PRESUMPTION. When in an action for damages for a physical injury there is substantial evidence of contributory negligence on the part of the person injured, it is error to instruct the jury that there is a legal presumption that he exercised ordinary care.

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3. **Elevators:** STANDARD OF CARE REQUIRED OF OWNER. *Held*, in the course of discussion, that, in determining whether the owner of an elevator has exercised due diligence in making it reasonably safe for its intended uses, the usage of others is not the sole criterion, and that such diligence does not, as a matter of law, follow from the fact that the elevator is such as is ordinarily used for like purposes by reasonably prudent men.

*Appeal from the St. Louis Circuit Court.*—HON. JAMES E. WITHROW, Judge.

REVERSED AND REMANDED.

*A. & J. F. Lee* for appellant.

*Virgil Rule* and *A. R. Taylor* for respondents.

BOND, J.—This is an action by the parents for compensation for services of a child whose death was occasioned in the use of an elevator belonging to defendant.

The negligence alleged in the petition is: *First.* A defective and negligent construction of the elevator by reason of "an open space between the floor of said elevator car and the door of the elevator," of such dimensions as to "create a dangerous hole or trap into which the passengers upon said elevator were likely to fall." *Second.* "That in the running of said elevator it shook and was unsteady." *Third.* "In having in charge of said elevator an inexperienced person."

The answer was a general denial and a plea of contributory negligence. There was a verdict and judgment for $1,600 in favor of plaintiffs in the trial court, from which the defendant has appealed.

The errors assigned are: *First.* That the court should have sustained appellant's demurrer to the evidence. *Second.* That the court erred in giving the following instruction, viz.:

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"The court instructs the jury that there is a legal presumption in this case that the deceased, Robert E. Lee, was in the exercise of ordinary care at the time of his injury and death, and the burden of proving to the satisfaction of the jury that said deceased was not exercising such care, before this case can be defeated on the ground of contributory negligence upon the part of the deceased, is upon the defendant."

The first assignment of error imposes upon us the duty of examining so much of the evidence as related to the construction of the elevator openings, its steadiness of operation, and the circumstances attending the accident to the son of plaintiffs.

The construction of the elevator, and its appearance when stopped at one of the five landings, is shown in the subjoined cut:

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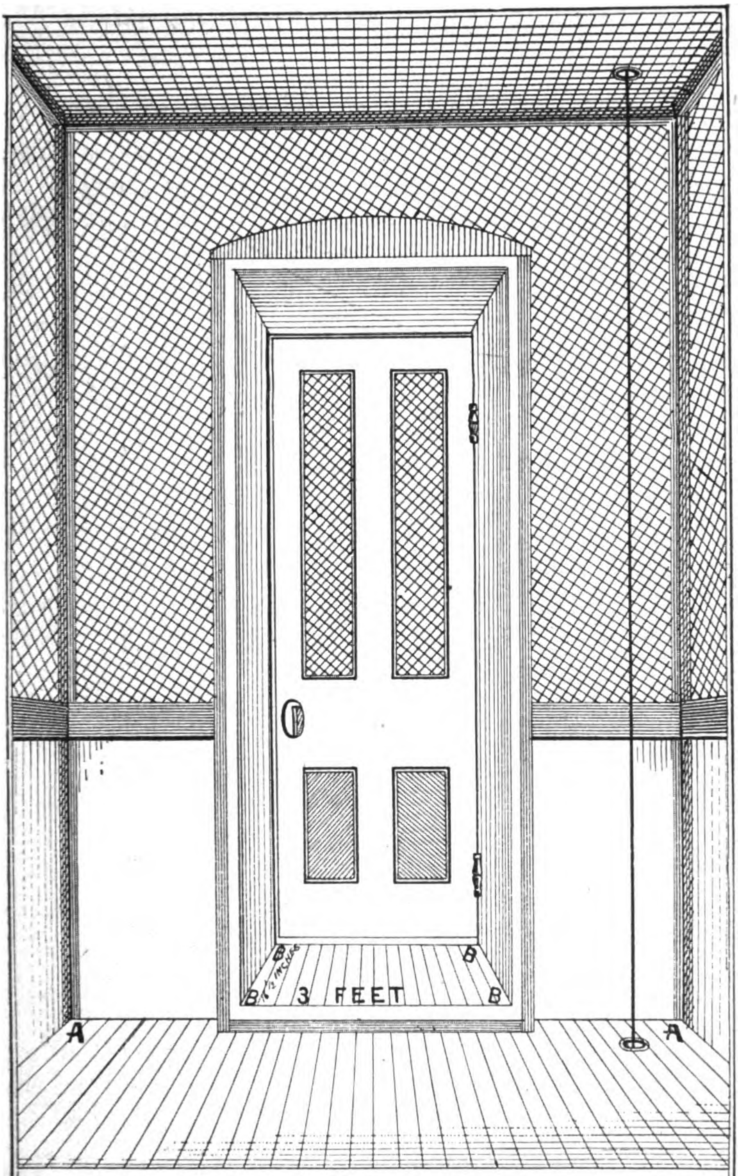


A. ELEVATOR FLOOR.

B. HALL OR RECESS SPOKEN OF AS PLATFORM.

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The cage of the elevator is about six feet square; the entrance from the hall on each floor is through an opening sixteen and one-half inches deep, three feet wide and eight feet high. This entrance has the form of a small hall of these dimensions, divided by a door from the larger halls on each floor of the building. There was an unprotected outlet from the elevator cage to this smaller hall, whenever the cage passed or stopped in front of said small hall.

With reference to the motion of the elevator cage during its operation, the evidence of the two witnesses for the appellant was that there was a lateral motion left in elevators of this sort, in order that the guides might not bind; that it was not considered a shaking elevator, and would not shake a man off. The testimony of respondents' two witnesses on that point was a part of their evidence as to the accident. Andrew Aylward, fourteen years old, a report boy of the Western Union Telegraph Company, knew the deceased boy for the two months that the latter had been delivering messages and associated press dispatches for the telegraph company, and was on the elevator with him on the night of his death. This witness on direct examination said: "Me and the elevator boy and this little Lee boy was going up in the elevator, and this little Lee boy was standing in a small corner. Anybody could fall out of it, it is so small; it is about that wide (indicating). There was no part of the elevator that wide. He was standing in the corner, when he got in the elevator; I was in the next corner, the next opposite; the elevator boy was standing cater-cornered from me, and the little Lee boy, while the elevator was going up, he stepped off, I suppose."

"*Q*. State just what you saw? *A*. I heard the little fellow holler. I looked down and saw him with one

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foot at the corner where he was standing; the rest of him on his face and hands.

*Q.* Where was he resting his face and hands? *A.* On the little platform that came in from the door.

*Q.* Where were his feet at the moment? *A.* On the elevator; one foot was on the elevator.

*Q.* What did you do? *A.* When he hollered, I looked there and saw his foot and made a grab for it, and just as I made the grab for it he went through the space and went to the bottom.

*Q.* Will you explain to the jury what you mean by this space, I mean the space when the elevator went up? *A.* It was that high from the platform of the door; he went through the space, he swung right through it.

*Q.* Illustrate it? *A.* I don't know what you mean by illustrate it.

*Q.* That is a fact, I am too lofty for you; explain to the jury how that space was made, the hole in which he fell? *A.* When the elevator goes up, passes the fourth floor, there is a space left, and anybody could fall out if he wanted to.

*Q.* How big is that space? *A.* When the boy fell, the space was about that high (indicating). * * * .

*Q.* As the elevator passed up the space, what, if anything, was there to prevent a person stumbling and falling off the elevator into space? *A.* In the first place, the door was too far back.

*Q.* You didn't see the boy at the time he fell? *A.* No, sir.

*Q.* As the elevator passed by the open space, with the elevator boy standing in the elevator, what was there to prevent him from falling into the open space if he lost his balance? *A.* I don't know.

*Q.* Did you know of anything? *A.* There was a platform coming from the door, that is all I know. * * * .

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*Q.* Show the jury how his body and his stomach were—his breast was resting? *A.* One of his feet was in the elevator, the elevator came right straight up, and it dropped him into the space from the door. Just as it dropped him, his other foot came off and he went right to the bottom, as soon as I made a grab.

*Q.* How far did he fall? *A.* From the fourth floor to the first.

*Q.* How did the elevator run? *A.* It used to shake when it would run.

*Q.* Could you describe to the jury how much it shook? *A.* I can't describe that.

*Q.* Did you ever ride on an elevator that shook as bad as that one? *A.* No, I never rode on any elevator that shook that way.

*Q.* What was the elevator boy doing at the time? *A.* The elevator boy was speaking to me.

*Q.* Do you remember what you were speaking about? *A.* No, sir.

*Q.* When your attention was called to the boy by the outcry, I will ask you whether his head, as he lay at that moment, was higher or lower than the floor of the elevator? *A.* It was lower.

*Q.* One of his legs you say was on the floor of the elevator? *A.* Yes, sir.

*Q.* Where were his hands? *A.* On the floor of the door, on the platform coming out from the door."

On cross-examination he said, upon inquiry as to his statement before the coroner, that he gave testimony there on the day following the accident, and told everything he knew about it, *and exactly as it occurred.* He also testified on cross-examination, to-wit: "*Q.* See if you remember this. Don't you remember that you said the little boy, Willie Lee, wanted to get off on the fifth floor, and, when he reached the fourth floor, he

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thought he was on the fifth, and tried to get off—do you remember saying that? *A*. Yes, sir."

After stating that he did not remember certain other questions and answers, he was further interrogated as to his examination before the coroner, to-wit:

"'*Q*. Do you know how he came to fall? *A*. The elevator was going, and I suppose it turned it *(sic)* onto his face. The elevator was going up to the fifth floor, and, while the elevator was going, he walked right out of the elevator onto the fourth, and his foot got caught in one of the corners and he fell on his face; and the elevator kept going, and he gave a little hollo, and I made a grab for his foot and I tried to save him, but he was gone before I could.' Was that question put to you, and did you give that answer? *A*. I think I answered that question, I think I told the coroner that.

*Q*. You think you told him more than that? *A*. I think I told him what you read there.

*Q*. Now, I want to see if you remember this question? '*Q*. How fast was the elevator going? *A*. It ain't a very fast elevator, you can't make it go; the one on Third street could go up and down five times while that would be going up once; it is not a very fast elevator at all.' Did the coroner ask you that question, and did you give that answer? *A*. Yes, sir.

*Q*. Does that elevator always go slow? *A*. Yes, sir; you cannot make it go any faster. Did you say that too? *A*. Yes, sir."

Charles Willis, the elevator boy, sixteen years of age, testified in chief.

"*Q*. Now, describe that elevator to the jury; what kind of an elevator was it? *A*. It was a large, clumsy, shaky kind of a thing.

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*Q*. To what extent would it shake? *A*. That I don't know, exactly; it has been so long since I was in it.

*Q*. At that time? *A*. That I don't know; it shook considerable anyway?

*Q*. Now, will you describe to the jury that space that would be by the side of the elevator as it passed these doors at the different stories? *A*. The way it was there, it would be a space of about three feet one way and about sixteen inches the other, cross-ways.

*Q*. About how high? *A*. Eight feet or seven and a half.

*Q*. About three feet wide? *A*. Yes, sir.

*Q*. And sixteen inches in depth? *A*. Yes, sir.

*Q*. As the elevator floor passed this space, if a person on the elevator floor should fall or stumble, what was there to catch him, to prevent him going into this space? *A*. Nothing.

* * * * * * * * *

*Q*. Tell the jury now the first thing you knew of the accident to the boy? A. The first thing I knew was when Willie hollowed. I stopped the elevator, and the little fellow, Andrew, was trying to get hold of Willie's foot; I could not get hold of it before he slipped off of the elevator and fell through the shaft, because Andrew was between me and Willie.

*Q*. Describe how he was when you first saw him after hearing him scream? *A*. I could not see anything of him but his foot and part of his leg.

*Q*. Where was his foot? *A*. Hanging on the elevator floor.

*Q*. His body protruded through the space in the door? *A*. Yes, sir.

*Q*. You didn't see him when he fell? *A*. No, sir.

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*Q*. At the moment you saw the body in the position you have described to the jury, about how high was the floor of the elevator above the entrance of the door way? *A*. About three feet by the time I stopped, the elevator was not over three feet and a half.

*Q*. You stopped it as quick as you could. *A*. Yes, sir.

*Q*. If you had been looking at the boy when he fell, you could have stopped the elevator in time to have saved him? *A*. I think I could, yes, sir.

*Q*. What were you doing at the time? *A*. I was standing up, looking for the knot in the rope that came down to prevent the elevator hitting the top. The last time I saw Willie he was standing in the corner of the elevator.

*Q*. Before you heard the boy cry out, where had you last seen him standing? *A*. Right in the corner by the side of the door, the left-hand side of the elevator door.

* * * * * * * * *

*Q*. Do you remember anything occurring on that trip, on the trip that the boy got hurt, anything about his trying to take the elevator rope, anything of that sort? *A*. I only know when I was going up, after I passed the second floor, he put his hand on it, and said he didn't think I could stop it with one hand—I don't think he got any hold; then he took his hand off the rope.

*Q*. Did he do anything? *A*. No; he walked into the corner, and, when I turned my back on him, I don't know how he got to the door."

On cross-examination this witness stated to-wit:

"*Q*. This was a slow elevator? *A*. Yes, sir.

*Q*. You say that elevator was unsteady? *A*. Yes, sir.

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*Q.* I want to know the extent of its unsteadiness. It ran up between four walls? *A.* Yes, sir.

*Q.* The walls were close around it? *A.* Yes, sir, but the clutches on each side never fitted very tight.

*Q.* The clutches on each side? *A.* Yes, sir.

*Q.* Never fitted tight? *A.* Yes, sir, and that caused it to shake.

*Q.* All the time it was shaking, it was going slowly? *A.* Yes, sir; it was not a fast elevator.

*Q.* It could not have shaken enough to throw a man down the hole? *A.* No. There was a piece of iron worn as smooth as glass; the least jar there would make him slip.

*Q.* If he had been standing on it. *A.* Yes, sir.

*Q.* You don't think it shook enough to shake anybody off? A. Not unless they had a poor balance.

*Q.* What was the necessity of standing on the iron? A. None, unless they were in a hurry to get off as soon as it stopped.

*Q.* If he was going to get off and opened the door himself, he might take the position. There was no necessity of his doing it then? A. No, sir.

*Q.* Do you remember of the little boy on the third floor thinking he was on the fourth floor? *A.* No, I don't know he thought that.

*Q.* Do you remember, when he was on the third floor, of his catching hold of the rope and trying to stop it with one hand, and then his saying he could not do it on the fourth floor when he was only on the third? *A.* That was between the second and third he put his hand there. He said he didn't think he could stop it on the fourth floor with one hand.

*Q.* Where was he then? A. Between the second and third.

*Q.* You remember giving your testimony before the coroner, don't you? *A.* Yes, sir.

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*Q*. I will ask you if you remember these various questions:

'*Q*. Now, tell all you know about the case? *A*. I stopped the elevator on the third floor, and, when I was ready to start, he said let's see if he could pull it with one hand.

*Q*. Who said? *A*. Little Robert Lee; and he could not pull it. I pulled the rope and I started the elevator up, and, when we got to the fourth floor, he aimed to step off on the little platform that is there, and then tried to step back again while the elevator was in motion, but it was too high for him, and he only got one foot on the elevator, and that foot was fastened in the side of the guard, had it fastened in the guard somewhere, and I did not see him, and the elevator going up; that pulled his foot up higher and he hollered, and I stopped the elevator as quick as I could as soon as he hollered. And then this fellow tried to catch——.

*Q*. What followed? *A*. Andrew Aylward tried to catch hold of his foot, and his foot slipped off of the elevator, and he rolled off of the door down through the shaft.' Do you remember those questions and answers? *A*. I said I suppose he tried to step off; I never saw him.

*Q*. That was a supposition of yours? *A*. Yes, sir.

*Q*. You didn't actually see him? *A*. No, sir.

*Q*. But you did stop it as soon as you saw him? *A*. Yes, sir; before I saw his foot—as soon as I heard him hollow.

* * * * * * *

*Q*. What made him try to get out? *A*. I do not know; I suppose he mistook the fourth floor for the fifth.

*Q*. Do you remember that? *A*. Yes, sir.



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*Q*. What makes you think that? *A*. Well, they have a habit of getting out because the elevator always stops itself on the fifth floor. *A*. Yes, sir."

From the foregoing evidence the jury could have drawn two inferences: *First*. They might have given credence to the statements made before the coroner, and affirmed on the trial by witness Aylward, that the deceased boy, Lee, "wanted to get off on the fifth floor, and, when he reached the fourth floor, he thought he was on the fifth *and tried to get off;*" and, to the further statement of this witness (admitted to have been made before the coroner), that "the elevator was going, and I suppose it turned it *(sic)* on his face. The elevator was going up to the fifth floor, and, while the elevator was going, *he walked right out of the elevator* onto the fourth, and his foot caught on one of the corners and he fell on his face; and the elevator kept agoing, and he gave a little hollo, and I made a grab for his foot and I tried to save him, but he was gone before I could." Had the jury relied upon this evidence, they might have reasonably inferred therefrom (as the testimony given on the trial shows the witnesses themselves did) that the deceased mistook the fourth floor for the fifth, and voluntarily got off there while the elevator was moving, and caught his foot in the guard in trying to get back on the elevator after he had discovered that it was not going to stop, and was thereby injured.

*Second*. The jury might have discredited the evidence given by this witness before the coroner on the day following the occurrence and affirmed on the trial, and given their entire belief to the other statements afterwards made on the trial by the two witnesses, Aylward and Willis, to the effect that they did not actually see the deceased until they heard him hollo, and then beheld him with one foot on the elevator and

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the remainder of his body on the landing outside of the cage. To have adopted this view, the jury would have been compelled to confine their consideration to a *part* only of the testimony, and must have drawn from this portion an inference that the deceased lost his footing by the shaking or unsteadiness of the elevator cage, and thus fell or was thrown on the outside landing. Although the two witnesses for the respondents stated also on the trial that they did not see how the boy got on the outside landing, one of them (Aylwark) said, "he stepped off, I suppose," and the other witness (Willis) said, "I suppose he tried to step off; I never saw him," thus showing that neither of these witnesses supposed he fell, or was thrown, off the elevator by its shakiness, but, on the contrary, distinctly negatived this view in their own conclusions from what they saw.

In actions at law the jury are the sole judges of the weight of testimony and the credibility of witnesses. In such cases where the evidence is conflicting, or is susceptible of being the basis of different *rational* inferences, then it is the sole province of the jury to reconcile it, or to adopt that particular *rational* inference which, in their judgment, justly arises. These principles constrain us to hold, under the testimony in this case, that the trial court did not err in leaving it to the jury to say whether the deceased negligently stepped off the elevator or was thrown therefrom by the unsteadiness of the car.

The complaint as to the instruction *supra* is that the court therein told the jury "that there is a *legal presumption* that the deceased, Robert E. Lee, was in the exercise of ordinary care at the time" of the accident. The objection to this statement in the instruction is that it misled the jury under the evidence and legitimate inferences. The law is that in case of an

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*unexplained* injury caused to one by negligently constructed machinery, or a negligent opening in the sidewalk, or other negligent contrivance, a rebuttable presumption that the party injured thereby was at the time exercising ordinary care may be indulged. If, however, there is substantial evidence of the manner and causes of the injury, such presumption ceases to exist. This is in accordance with the facts of the case, and the actual decision of the supreme court in *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 233, and it is clearly the doctrine as now maintained by the supreme court in their subsequent decisions, and is supported by reason and the weight of authority in other states. *Moberly v. Railroad*, 98 Mo. 183; *Rapp v. Railroad Co.*, 106 Mo, 423; *Whitaker v. Morrison*, 44 Am. Dec. 627; Lawson on Presumptive Evidence, rule 120, p. 576; *Whitsett v. Railroad*, 25 N. W. Rep. 104; *Railroad v. Stebbing*, 52 Md. 504. In *Buesching v. St. Louis Gas Light Co., supra*, it is said: "Slight circumstances, however, in the absence of direct evidence, may overcome the presumption of freedom from negligence which the law indulges." In that case there was no *evidence whatever* showing how the accident occurred.

In the case of *Moberly v. Railroad Co.*, 98 Mo. 183, the evidence was conflicting on the issue of plaintiff's negligence. In that case the court, in speaking of an instruction similar to the one under consideration, used the following language:

"Instruction numbered 5, given at plaintiff's instance, should not have told the jury that the law presumed that plaintiff exercised ordinary care, while submitting the question of his care or negligence as an issue. The presumption that everyone exercises ordinary care obtains in the absence of evidence to the contrary. But there was abundant evidence from which plaintiff's negligence on the occasion in question might

have been fairly found. With that evidence before them, it was calculated to give the jury a wrong impression of its effect to say that a presumption of care then existed in plaintiff's favor."

This ruling was affirmed in *Rapp v. Railroad*, 106 Mo. 423. In that case, also, there was evidence from which plaintiff's negligence might have reasonably been found by the jury. It was therefore held that an instruction, embodying a presumption that he was in the exercise of ordinary care, should not have been given.

The doctrine of these cases is that a disputable presumption, permitted to be drawn in the absence of all evidence of the facts and circumstances, should not logically be given in a charge to the jury after evidence has supervened. The reason of the rule is that, *after evidence*, the jury should determine the case on the evidence, unbiased by a presumption which might have been drawn *before* evidence.

In the case at bar there *was evidence* from which the jury might have rationally inferred that the deceased boy was neither shaken nor fell off the cage of the elevator, but that he voluntarily tried to get off and get back while it was in motion, and before it had reached the proper landing. The existence of such evidence is the ground upon which the supreme court in the two cases last cited held an instruction like the one before us reversible error. We hold, therefore, that the trial court erred in giving, under the evidence in this case, the instruction whereby the jury were told that there was a legal presumption that the deceased was exercising ordinary care at the time of the accident.

The two cases, *Porter v. Railroad*, 71 Mo. 72, and *Muirhead v. Railroad*, 19 Mo. App. 646, cited by respondent in support of the instruction, are not in point. The instructions in those cases merely stated

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the rule of law applicable to contracts of service, whereby the servant is bound to assume the risks naturally incident to the work which he undertakes. The propriety of that instruction furnishes no analogy for the giving of one asserting a presumption (disputable) of due care in favor of one whose negligence is an issue touching which there is a conflict of evidence.

As this case must be retried, the court should avoid, on the next trial, an inaccuracy in one of the instruction given for appellant, where the jury were told "that no inference of negligence can be made against the defendant in regard to said elevator, if you find from the evidence that it is such as is ordinarily used in like purposes by reasonably prudent persons engaged in the same kind of business." Mere usage by others is not the sole criterion. It is the duty of owners of elevators to make them reasonably safe for the uses to which they are to be put; and, in so doing, they should exercise that degree of care employed by reasonably prudent men in attaining the same end. *Reichla v. Gruensfelder*, 52 Mo. App. 43.

For the reason here given, the judgment is reversed and the cause remanded. All the judges concur.

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SCHREINER, FLACK & Co., Appellants, v. ISAAC ORR, Administrator of L. C. WILSON, Respondent.

St. Louis Court of Appeals, December 5, 1893.

1. **Gambling Contracts:** SALES OF GRAIN ON MARGINS WITHOUT INTENT TO DELIVER. Since the Act of 1889 (Revised Statutes, 1889, sec. 3931, *et seq.*) contracts for the sale of grain are void, if one of the parties thereto does not intend to receive or deliver the commodity sold, and the other party is aware of his intent—whether he shares in it or not. That statute also affects middlemen.

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2. ——: ——: EVIDENCE OF INTENT NOT TO RECEIVE OR DELIVER. The intent of a party to the contract, that there shall be no delivery of the commodity, may be gathered from all the attending circumstances. And *held*, that the evidence in this cause warranted the inference.

3. **Practice, Appellate**: FAILURE OF TRANSCRIPT TO SHOW PURPORT OF REJECTFD EVIDENCE OF APPELLANT. The court cannot review a ruling of the trial court in excluding a writing offered in evidence by the appellant, when the writing is not embodied in the transcript, and its effect is, therefore, not disclosed.

*Appeal from the St. Louis City Circuit Court.*—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

*Charles F. Joy* and *Charles M. Napton* for appellants.

*F. J. McMaster* for respondent.

The court committed no error in making alterations to the instruction offered by appellants, nor in giving the instructions offered by respondent. *Mulford v. Cæsar*, 53 Mo. App. 271; *Hill v. Johnson*, 38 Mo. App. 393; *Crawford v. Spencer*, 92 Mo. 498.

BOND, J.—The appellants filed in the probate court for allowance a note for $500, made to them by L. C. Wilson, respondent's intestate, on the fifteenth day of May, 1890. This claim was allowed in the probate court, from which decision the respondent administrator appealed to the circuit court, where a verdict was rendered in his favor. The defense to the note, both in the probate and circuit courts, was that it was given for an illegal consideration, *i. e.*, for speculations on the differences in the market value of wheat bought and sold without any intention of delivery. The evidence tended to show that the appellants in 1890 bought

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and sold wheat on account of said Wilson for delivery in July of that year; that these transactions were closed out in the April preceding; that no wheat was received by Mr. Wilson, or delivered to him; that the wheat in question, having been bought for July delivery, could not be delivered until that month, at which time it was delivered by the appellants to certain parties to whom it has been sold; that most of the trades made by Mr. Wilson through appellants were made upon his own order—in these cases the evidence did not show the persons with whom he was dealing; but that, when his trades were made by appellants, they were placed with four named firms, who were engaged in the business of receiving grain on consignment, and buying and selling for future delivery; and that all of his trades, whether made by himself directly, or by appellants as his agents, were placed on appellants' books, and were guaranteed by contracts made by appellants with other parties to the contract.

The appellants offered in evidence a printed notice (not set out in the record), which they claimed to have, as showing how their deliveries of the July wheat bought and sold by them for Mr. Wilson were made. The court excluded this form of notice from the evidence, to which exception was saved. The evidence also tended to show that, prior to his dealiings with appellants, L. C. Wilson had speculated on 'Change; that he was a traveling salesman, earning a salary of about $4,000, the year before his death; and that he was not connected with the milling business, and had no storehouse for the grain. The account of his transactions, as set forth on appellants' ledger, disclosed that he paid to them $300 at the beginning of his dealings. It showed various credits to him on grain bought and sold at the date of such items. The evidence showed that no wheat was ever actually delivered to him.

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The errors assigned by appellants are:

*First*, the modification by the court of the following instruction, prayed by appellants, by the addition thereto, against his exception, of the italicised words, to-wit:

"The jury are instructed that a sale of goods to be delivered in the future is valid, even though there is an option as to the time of delivery, and, although the seller has no other means of getting the goods than to go into the market and buy them; but if, under the guise of such a contract, valid on its face, the real purpose and intention of both parties is merely to speculate on the rise and fall in prices of such goods, and the goods are not to be delivered, but only differences paid between the contract and market price, then such a contract is a wager, and is void. But it is not enough to render the contract void that one party only intended by it a speculation in prices; it must be shown that both parties did not intend to deliver the goods, and that both contemplated and intended a settlement of differences in prices only.

"Upon the foregoing exposition of the law, as applicable to the defense set up in this case, the jury are instructed that, before the defense can defeat a recovery here, it has the burden of proving that both the deceased, Wilson, and also the parties from whom and to whom he bought and sold, intended no delivery of the goods, and were only speculating on the rise and fall of prices, *or that it was the understanding between Wilson and the plaintiffs that there was to be no such delivery but such speculation only.*"

And the giving for the respondent of the following instruction:

"The court instructs the jury that, if they believe from the evidence in this case that Lewis C. Wilson, employed the plaintiffs to buy and sell grain, not

intending to receive or deliver the article bought or sold, but only for the purpose of speculating in the future price of such grain, and that plaintiffs were privy to such intent or purpose, and that, under the contracts which plaintiffs may have actually made with third parties in filling such orders, no grain was intended actually to be received or delivered by either of the parties to such contracts, but that it was the intention of both said parties merely to settle for the difference in price, and that the note sued on was given in settlement of such difference in price, then plaintiff cannot recover in this action, and the jury will find for the defendant. And the jury is also instructed that, in ascertaining the intent of the parties to the contracts or purchase and sale mentioned in the evidence in this case, they are not limited to the assertions of parties on one side or the other, but that all the attending circumstances connected with the transaction must be looked into.

"The court instructs the jury that, if they believe from the evidence that, at the time Lewis C. Wilson instructed plaintiffs to buy and sell the grain mentioned in evidence in this case, it was mutually agreed and understood between them that no grain was to be delivered or received in the settlement of such purchases and sales, but they were to be settled by the payment of differences, then plaintiff is not entitled to recover, and you will find for the defendant."

*Second.* The exclusion by the court of the evidence offered by appellants to show the form and method of their deliveries of the July wheat, bought and sold for Wilson.

I. Touching the objection made by appellants to the modification of their instruction by the addition of the words in italics to-wit: "*or that it was the understanding between Wilson and the plaintiffs that there was*

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*to be no such delivery, but such speculation only,"* we say that the act to prohibit fictitious and gambling transactions in agricultural products, etc., approved March 9, 1889, Revised Statutes, 1889, secs. 3931, 3936, was held by this court to have been designed to alter the law as it stood before this enactment, "that in order to make a contract unlawful as a wagering contract, *all the parties thereto* must have intended not to receive or deliver the commodity purchased or sold;" and to establish, by the statute in question the law that, to render such contracts void, it should only be necessary that one of the parties did not intend to receive or deliver the commodity bought or sold, and that the other party knew of this intent, whether he shared in it or not. We also held that the statute affected middlemen. *Mulford v. Cæsar*, 53 Mo. App. 274, etc. It is obvious, therefore, that, inasmuch as the record shows that all the transactions out of which the indebtedness arose took place after the passage of the above act, the trial court did not err in modifying the instruction requested by appellants so as to conform to the legislative rule. These observations also show that the court did not err in embracing the same principle in respondent's instruction.

II. It is urged by appellants that the evidence does not sustain the hypothesis of respondent's instruction, "that it was mutually agreed and understood between them (appellants and Wilson) that no grain was to be delivered or received in the settlement of such purchases and sales, but that they were to be settled by the payment of differences."

This is an action at law; it is sufficient, therefore, to sustain the finding of the jury that there should have been some substantial evidence in its support. It has been repeatedly held by the appellate courts of this state that "all the attending circumstances" of a con-

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tract for purchase or sale for future delivery, as well as the statements of the parties, are evidentiary. We cannot hold from the circumstances of the contracts, the acts and doings of the parties thereunder, and their relative situations, that there was no substantial basis from which the jury could have justly inferred that it was the intention of Wilson and appellants that there should not be a delivery. The finding of the jury on this issue, under the facts and circumstances shown in this record, is not reviewable by us.

III. Appellants insist that the court erred in excluding from the evidence a form of notice of delivery, used in the delivery of the wheat at the maturity of their contracts. This notice is *not made part of the record*, and we are not apprised of its terms or contents. We cannot, therefore, adjudge its legal effect. As we have not the paper before us, we cannot say that it tended to show what appellants did with the wheat in question, nor can we hold that the trial court erred in excluding it.

The result is that the judgment herein is affirmed. All the judges concur.

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55 412 93 1182 SUNDAY MIRROR COMPANY OF ST. LOUIS, Appellant, v. JAMES M. GALVIN, Respondent; SUNDAY MIRROR COMPANY OF ST. LOUIS, Respondent, v. JAMES M. GALVIN, Appellant.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Attachment:** DEBT FRAUDULENTLY CONTRACTED. **The conversion of money, though fraudulent on the part of the tort feasor, will not constitute a fraudulent contraction of a debt within the purview of the statute defining the grounds of attachment.**

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2. **Assignment of Chose in Action:** ABSENCE OF FORMAL TRANSFER. A corporation was formed to carry on the business of a partnership. It was intended to transfer all the assets of the partnership to the corporation in partial payment of its capital stock, but no formal transfer was executed. Though no other payment was made, the articles of incorporation recited that half of the capital stock had been paid. *Held*, that members of the partnership, who had acted as incorporators, were estopped from disputing the title of the coporation to the property thus intended for it.

3. ——: ASSIGNABILITY OF CONTRACT RIGHTS. A contract which stipulates for the support of a newspaper for a publication, does not rest on a personal confidence. The owners of the newspaper may therefore assign their rights under it to a corporation formed to conduct the newspaper.

*Appeal from the St. Louis City Circuit Court.*—HON. JOHN A. HARRISON, Special Judge.

AFFIRMED.

*D. P. Dyer* for plaintiff.

*Charles F. Joy* and *D. B. Kribben* for defendant.

(1) "Old and New St. Louis" was a trust fund, and it and the contract, from their very nature, could not be assigned by Fanning & Galvin without the consent of Mather & Blood. *Boykin v. Campbell*, 9 Mo. App. 495; *Lansden v. McCarthy*, 45 Mo. 106; *Arkansas, etc., Co. v. Belden*, 127 U. S. 379; *Board of Commissioners v. Diebold*, 133 U. S. 473. (2) The evidence fails to show the assent of Mather & Blood to the assignment of a contract, the nature of which discloses a credit extended to, and a trust and confidence reposed in, the persons of Fanning & Galvin; hence no title can vest in the assignee in such contract or any part of it, without the consent of the other parties, and no action will lie thereon in favor of the assignee. Authorities above cited.

BIGGS, J.—This is an action for money had and received, with an attachment in aid. The plaintiff

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appeals from a judgment against it on the plea in abatement. The defendant appeals from a judgment against him on a trial of the merits.

The petition states substantially the following facts› In the month of February, 1891, the defendant and one M. A. Fanning entered into a copartnership for the purpose of printing and publishing a weekly newspaper in the city of St. Louis, to be called the *Sunday Mirror* The style of the firm was Fanning & Galvin. Each party contributed about $1,500 to the capital of the concern. The necessary materials were purchased, and the publication of the paper commenced. In October, 1891, Fanning & Galvin as publishers of this paper entered into a contract with Mather & Blood, who were publishing a history of the city of St. Louis in book form under the title of "Old and New St. Louis." The agreement reads: "This agreement, made and entered into between Messrs. Fanning & Galvin, publishers of the *Sunday Mirror* of St. Louis, of the first part, and Mather & Blood of the second part, for the publishing of the history of the city of St. Louis in book form, under the title of "Old and New St. Louis," under the auspices and in the co-operative name of the *Sunday Mirror* upon the following provisions:

"*First.* In consideration of twenty-five per cent. of the net profits (over and above all expenses), the said Fanning & Galvin, of the first part, do hereby agree to give Mather & Blood, of the second part, their full support, and use of the co-operative name of the *Sunday Mirror* in any way pertaining to and securing of business for the said work.

"*Second.* Mather & Blood, of the second part, do hereby agree to attend to all details in the management of securing business and publishing of said work; and do further agree to make all collections in the name of

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said Fanning & Galvin, who agree to cash all checks at any time called for, retaining twenty-five per cent. of such collections as a guarantee until the final settlement, unless otherwise required to be used in making the publication or printing of said work. Mather & Blood do further agree to make a full statement of business done at any time called for by said Fanning & Galvin."

This contract was in force on the twenty-fifth day of February, 1892, when Fanning and Galvin agreed to organize a corporation, to be known as "The Sunday Mirror Company," with a capital stock $50,000, divided into five hundred shares of $100 each. Fanning and Galvin subscribed for all of the shares, except two or three which were given to other parties in order to effect the incorporation; and it was agreed that the entire capital stock should be paid by a transfer to the proposed corporation of all the assets of the firm of Fanning & Galvin. In pursuance of this agreement, articles of incorporation were drawn up and were acknowledged by the defendant and the other stockholders, in which they certified that one-half of the capital stock, to-wit, $25,000, was paid in money. The defendant was named as a member of the board of directors. A certificate of incorporation was issued on March 8, 1892, and thereafter the new company became the owner of all of the assets of Fanning & Galvin including the emoluments (if any) arising from the contract with Mather & Blood, to which the latter consented. At the time the corporation was formed, Fanning & Galvin had deposited with the Laclede National Bank, in the name of the firm, all money received by them under the contract with Mather & Blood, and they had given to the latter checks for seventy-five per cent. of such collections, retaining, themselves, twenty-five per cent., as provided by the terms of

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the contract. After the incorporation of the plaintiff, this bank account was permitted to remain in the name of Fanning & Galvin, and all moneys thereafter collected by the plaintiff on account of the contract with Mather & Blood, and from all other sources, were placed to the credit of this account. Prior to the incorporation, Fanning had control of the editorial department of the paper and the defendant was the business manager, both parties having authority to draw checks against the bank account of the firm. After the incorporation, Fanning was elected president, and the defendant secretary and treasurer, of the corporation, the duties and powers of neither being in any substantial manner changed. On the twenty-first day of March, 1892, another contract with Mather & Blood was substituted for the first one, so that the plaintiff should receive fifty per cent. instead of twenty-five per cent. of the net profits arising from the publication of the history. In this respect *only* was the old contract modified or changed. The modified contract was also made in the name of Fanning & Galvin. The banking business of the plaintiff was conducted, as before, in the name of the firm of Fanning & Galvin, until the third day of June, 1893, when the account was closed with the Laclede National Bank, and a new one opened in plaintiff's name with the St. Louis National Bank. A few days prior to the last mentioned date, the defendant commenced negotiations with George D. Dyer for the sale of his stock, which resulted in a purchase by Dyer on June 1 for $4,000 cash. At the time these negotiations commenced the plaintiff had accumulated in bank about $2,000 from collections under the contract with Mather & Blood, which it had a right under the contract to retain. During the pendency of the negotiations, to-wit, on May 28, the defendant, by check, transferred $1,000 from the bank account, standing in

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the name of Fanning & Galvin, to his individual account in the same bank, which he afterwards checked out and put into his pocket. The defendant concealed this from Dyer and the officers of the plaintiff until after he had gotten the money from Dyer. A short time previous to this the defendant had also, without the consent of plaintiff, withdrawn from the bank the additional sum of $2,000, the money of the plaintiff, and he also converted it to his own use.

Upon this alleged state of facts the plaintiff brought the action, and in the affidavit for attachment it was stated that *the debt sued for was fraudulently contracted.* This was the only ground for attachment.

On the trial of the plea in abatement, which was submitted to the court sitting as a jury, and also on the subsequent trial on the merits, the plaintiff's evidence tended to prove the facts alleged in the petition, and its evidence also tended to show that the defendant, in the negotiations with Dyer for the purchase of his stock, represented to him that the contract with Mather & Blood was an asset of the corporation, and that a considerable amount of money had been collected under that contract, and was then on deposit in bank.

At the close of the trial on the plea in abatement the court gave the following instruction, to which the plaintiff excepted: "Although the court, sitting as a jury, may find and believe from the evidence that the $1,000 mentioned in evidence was the property of the plaintiff, and that defendant wrongfully and fraudulently drew the same out of bank and converted it to his own use, still, if the court further finds and believes from the evidence that plaintiff never consented or agreed to the drawing out and conversion of said money by defendant, but protested against the same as soon as known to it, and, upon discovering that defendant had drawn out and converted said money, demanded



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of him that he should return the same, and, upon his failure or refusal so to do, thereupon began this suit, then the finding and judgment must be for the defendant."

Thereupon the court found the issue for the defendant and entered a judgment dissolving the attachment.

It is contended by counsel for defendant that the instruction and the finding thereunder were in conformity with the decision of the supreme court in the case of *Finlay v. Bryson*, 84 Mo. 664. In this statement my associates fully concur.

The two cases cannot very well be distinguished as to their essential facts touching the right of attachment. Therefore, I am not prepared to dissent from the conclusion reached by the other members of the court. Yet the application of the governing principle to the facts in the *Finlay–Bryson case* is so unsatisfactory to me, that I deem it neither out of place nor indelicate to express my dissatisfaction.

Finlay delivered to Bryson four mules (the property of Finlay), with directions to sell them and to deposit the proceeds of sale to Finlay's credit. Bryson made the sale and received the money, but instead of depositing it he subsequently converted it. He also, at the same time, and without any authority whatever, withdrew from Finlay's deposit other money amounting $180, and he likewise converted it. Commissioner Martin decided that these facts failed to show that a "debt had been fraudulently contracted" within the meaning of the attachment law. The reasoning of the learned commissioner is to the effect that, where the *gravamen* of the complaint lies in *tort*, there can be no *debt* within the meaning of the attachment law. Thus, if the right of recovery is based solely on the wrongful conversion of property, the right of recovery does

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not rest in *debt*, but is one for damages resulting from the wrongful acts of the wrongdoer. The rule to be deduced from the decision is that, to authorize an attachment for a debt fraudulently contracted, the conduct of the defendant must have *culminated in a debt.*

I can very well understand how the conclusion was reached that the money withdrawn from bank could not be treated as the foundation for a debt proper. As to that money, the act of Bryson was a tort, pure and simple. It is true that Finlay could have waived the tort and sued *in assumpsit* for the money, as he did do; but it would not have been quite logical to have permitted him to have made the tort, which he had waived, the ground of his right of attachment. But I am puzzled to understand how the same rule could be made to apply to the money received by Bryson for the mules. He sold the mules as an agent, and the moment he received the proceeds he became the debtor of Finlay. How the subsequent conversion of the money changed the character of the transaction I can not conceive. If, therefore, at the time Bryson received the money he had made up his mind to convert it, these facts would present a clear case of a *debt fraudulently contracted.*

So, in the case at bar, all the evidence shows that the defendant, as the secretary and treasurer of the plaintiff, and also as a member of the firm of Fanning & Galvin, had the right to draw checks against the plaintiff's bank account (which was kept in the name of Fanning & Galvin), and to receive the money thereon. Neither the signing nor the cashing of the check was wrongful of itself. Therefore, if the money withdrawn by the defendant belonged to the plaintiff, or if it had the right under the contract with Mather & Blood to retain it, and the defendant withdrew it with the preconceived design to deprive the plaintiff of

it, then I cannot understand upon what theory there is no debt and that it was not fraudulently contracted.

It will be observed that the instruction as written proceeds upon the idea, that the act of Galvin in withdrawing the money was of itself wrongful and unauthorized. There is no foundation in the evidence for any such hypothesis. But as the Bryson case is to be followed, this would make no difference, for there Bryson received the money for the mules under direct authority from Finlay.

As the instruction is the only matter complained of on the trial of the plea in abatement, it follows that the judgment of the circuit court dissolving the attachment will be affirmed.

On the other branch of the case the contention of the defendant is that under the law and the evidence the plaintiff was not entitled to a judgment. The argument rests on three propositions: *First.* That the contract with Mather & Blood was not an asset of the corporation. *Second.* That there is no evidence of its transfer from Fanning & Galvin. *Third.* That there is no evidence that Mather & Blood consented to the change.

The defendant admits that the capital stock of the plaintiff corporation consisted *only* of the assets of the firm of Fanning & Galvin as the owners and publishers of the *Sunday Mirror.* The contract with Mather & Blood shows on its face that the consideration, which moved them, was to secure the co-operative influence of the newspaper in aid of their enterprise, and not the personal influence and aid of Fanning & Galvin, aside from their connection and control of the paper. This refutes the idea that the contract was independent and wholly disconnected from the business of Fanning & Galvin as publishers.

But it is urged that there is nothing in the record

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to show a formal transfer of the contract, or of any of the assets of the firm of Fanning & Galvin, to the plaintiff. This is true. But the defendant admits that the capital stock of the plaintiff was intended to be paid by a transfer of all the assets of his firm. He executed the articles of incorporation, in which he certified that one-half of the capital stock, to-wit, twenty-five thousand dollars, had been fully paid. Under such a state of facts the defendant ought to be, and he is, estopped from denying that the assets of Fanning & Galvin, which *alone* represented the paid-up capital of plaintiff, and which outside of the good will of the paper were not worth one-fifth of the amount for which the concern was capitalized, had not been transferred.

The authorities cited in support of the third proposition show merely that, where the obligations of a contract rest upon a personal confidence reposed in one of the contracting parties, he can not delegate the performance to a stranger without the assent of the other contracting party. As we have shown, the contract of Mather & Blood was one in which no particular confidence was reposed in Fanning & Galvin as individuals. The object of Mather & Blood was to secure the influence of the paper, and it could make no possible difference to them whether the paper was published by Fanning & Galvin, or by a corporation formed by them for that purpose. But the record contains substantial evidence that Mather & Blood were advised of, and consented to, the change. This issue was submitted to the jury, and was found in favor of the plaintiff, which leaves the defendant no room for complaint.

Our conclusion is that the appeal on this branch of the case is entirely without merit. The judgment will, therefore, be affirmed with ten per cent. damages, as asked by plaintiff. All the judges concur.

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59 435

HENRY AMES, Appellant, v. WILLIAM L. HUSE *et al.*, Respondents.

**St. Louis Court of Appeals, December 5, 1893.**

**Subrogation:** PARTIAL PAYMENT BY SURETY. So long as a debt has not been entirely paid, the partial payment of it by a surety will not entitle him, by way of subrogation, to any of the collaterals in the hands of the creditor by which it is secured.

*Appeal from the St. Louis City Circuit Court*—HON. JAMES E. WITHROW, Judge.

AFFIRMED.

*Hiram J. Grover* for appellant.

Where at the time of the assignment a debt of the assignor is secured by collaterals, and is subsequently partly paid to the creditor by moneys realized from the collateral before a dividend on the debtor's estate is made, such creditor is not entitled to a dividend on the full amount of his indebtedness, but only on that portion which remains after deducting the moneys received from the collaterals. *National Bank v. Lanahan*, 66 Md. 461; *Armory v. Francis*, 16 Mass. 308; *Bank v. Railroad*, 124 Mass. 518; *Hamor v. Railroad*, 133 Mass. 315, 316; *Bristol Bank v. Woodward*, 137 Mass. 412; *Franklin National Bank v. First National Bank*, 138 Mass. 515; *Wurtz v. Hart*, 13 Iowa, 515; *Moore v. Dunn*, 92 N. C. 63–67; *Bank v. Alexander*, 85 N. C. 352; *Midgley v. Slocomb*, 32 How. Pr. 423; *Bell v. Fleming*, 12 N. J. Eq. 13–22, 25–30; *Irons v. Manufacturing Bank*, 27 Fed. Rep. 591, 597; *Thibaudou v. Benning*, 5 Montreal L. R. Q. B. 425; *Ontario Bank v. Chapin*, 20 Can. S. C. 152; Burrill on Assignments, sec. 440, p. 103 and note; Revised Statutes, 1889, sec. 190.

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*Lionberger & Shepley*, *Walter B. Douglas* and *Wm. H. Scudder* for respondents.

A surety is not entitled to subrogation until the claim upon which he is surety has been paid in full. *Matthews v. Switzler*, 46 Mo. 301; Sheldon on Subrogation [2 Ed.], secs. 70, 127; *Kyner v. Kyner*, 6 Watts, 221; *Bank v. Benedict*, 15 Conn. 437; *Barnett v. Blodgett*, 39 N. H. 152; *McNee v. Legget*, 48 Miss. 139; *Corithers v. Stuart*, 78 Ind. 424, 433.

Biggs, J.—The plaintiff has appealed from a final judgment on a demurrer to his petition. In the opinion of the circuit court, it failed to state a cause of action. As no point is made on the form of the petition, it is unnecessary to set it out in full. A brief statement of the facts upon which the supposed right of action is based will suffice.

In 1884 the Lindell Hotel Association executed several notes, amounting to about $20,000. Plaintiff and Charles Scudder were accommodation indorsers thereon. The notes were transferred for value before maturity to the defendant bank, and were by it presented for payment at maturity, and were protested for nonpayment, of which the plaintiff, as indorser, was duly notified. In the meantime the hotel association had made a general assignment for the benefit of its creditors. The assignee allowed the notes in favor of the bank for their full value, to-wit, $21,408.70. Afterwards the bank sued the plaintiff as indorser on the notes, and recovered judgment against him for the full amount, which judgment he settled and compromised for $11,105.40, leaving a like amount of the original debt due from the hotel association and Scudder. Several years afterward, to-wit, in October, 1891, the assignee declared a dividend out of the money of

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the assigned estate of twelve per cent. on the amounts of all allowed claims, and the share of the state bank, computed on the full amount allowed, was $2,578.96, which amount the plaintiff alleged the assignee was about to pay to the bank.

Upon the foregoing state of facts the plaintiff claims that, having paid fifty per cent. of the amount of the notes, he is entitled to equity to be subrogated to fifty per cent. of the dividend.

The law of subrogation or substitution has no application in this case for the reason that, at the time the dividend was declared, one-half of the original debt due to the defendant bank remained unpaid. The general rule is well understood that, when a surety pays the debt of his principal, he may for his indemnity be subrogated into the place of the creditor as to all collaterals or funds held by the creditor, and applicable to to the payment of the debt. But it is equally well established that this right does not exist until the *whole* debt is paid, upon the idea that the creditor has the right to the full benefit of all securities held by him until his debt is fully satisfied.

In the case of *Matthews v. Switzler*, 46 Mo. 301, the plaintiff held three notes against a third party, maturing at successive periods, which were secured by a deed of trust on land. After the notes had all matured a sale was had under the deed of trust, and the proceeds applied to the payment of the notes last maturing, there being nothing left to apply on the first. The defendant was surety on the note first maturing, and the suit was brought against him on that note. The defense was that he was entitled to have the proceeds of the sale applied to the payment of the note first falling due. The court held that this position was untenable, and, in deciding the case, said: "The substantial question here is, shall the original creditor, who

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holds all the notes, have the full benefit of all the securities which he took for his own protection? He was not satisfied with the security of the deed of trust, and therefore required an additional name upon one of the notes. * * * In the meantime he has surrendered no security, and done nothing to prejudice the right of the surety upon the note. And since his debt is not paid, he now calls upon the surety to make good the unpaid balance," etc. It was suggested in the argument that, if Switzler, prior to the trust sale, had paid the note on which he was surety, he would then have had the right to be subrogated and to be indemnified first out of the mortgaged property, upon the idea that he would have occupied the position of an independent holder of the note, first maturing. In answer to this suggestion it was said: "The doctrine of subrogation or substitution has no application to the case. The creditor has not been paid, and, until he is either paid or secured, the surety has no right to be substituted in his place."

In the case of *Allison v. Sutherlin*, 50 Mo. 274, the plaintiff was subrogated to the rights of the creditor as to certain real estate belonging to his principal, and which was held as security for the debt; but it distinctly appears that the plaintiff had paid the *entire* debt.

In *Bank v. Benedict*, 15 Conn. 437, the rule is thus stated: "Though a surety who has paid the debt of his principal may be subrogated into the place of the creditor as to all the securities and funds in his hands applicable to such debt, yet, an accommodation indorser or surety is not entitled to the benefit of such securities or funds until the whole debt is paid."

In *Gannett v. Blodgett*, 39 N. H. 150, it was decided substantially that a surety cannot, either in law or equity, call for an assignment of the claim of the cred-

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itor against his principal, or be clothed by operation of law on principles of equity with the rights of an assignee of such claim, unless he has paid the entire claim of the creditor; that a *pro tanto* assignment by way of substitution or subrogation is not known or allowed.

In *Magee v. Leggett*, 48 Miss. 139, it was decided that a surety who pays the judgment debt of his principal, or who pays part of it and the principal the balance, will be subrogated to all the benefits which the creditor had by means of the judgment against the principal. But the court said that the rule was otherwise, "if the surety has made only part payment and *any balance remains unpaid, because, in that case, the surety has not entirely divested the rights of the creditor.*"

We can find no authority declaring a contrary doctrine, nor can we conceive how any such could exist and be applicable to the facts stated in the petition.

The cases relied on as establishing the plaintiff's alleged right to a part of the dividend are to the effect that, where an indebtedness due from an assigned estate is secured by collaterals, and such debt is subsequently paid in part by money realized from the sale of the collaterals before a dividend is declared, the creditor is not entitled to a dividend on the full amount of his allowed demand, but only on the amount actually due at the time the dividend is declared. *Bank v. Lanahan*, 66 Md. 461; *Armory v. Francis*, 16 Mass. 308; *Wurtz v. Hart*, 13 Iowa, 515; *Moore v. Dunn*, 92 N. C. 63; *Bell v. Fleming*, 12 N. J. Eq. 13; *Irons v. Mfg. Bank*, 27 Fed. Rep. 591. The law of these cases, and also that of all the authorities cited, is only made applicable, as the opinions show, where the collaterals formerly belonged to the debtor,—upon the principle that the creditors of an assigned estate are the equita-

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ble owners of the property, that such estate had been diminished to the extent of the value of the securities held by the preferred creditor, and that it would be inequitable to allow such creditor to share ratably in the remaining assets according to the face value of his allowed claim. Obviously, this rule cannot obtain where the debtor holds outside security. But, conceding everything contended for on this point, what would it argue in the plaintiff's favor? The creditors *only*, who held allowed demands, could complain of the excessive dividend in favor of the bank. The plaintiff did not have the amount paid by him allowed by the assignee, and the latter could only declare and pay dividends upon "allowed demands." (Revised Statutes, 1889, sec. 457.) Therefore, there could be no pretense for the plaintiff's alleged equities, except upon the theory that, as against the assigned estate, the bank was entitled to a dividend on the full amount of its claim, and that, as the plaintiff had previously paid one-half the debt, he was, in equity, entitled to one-half of the dividend, which we have attempted to show is not the law.

For the reasons stated we are of the opinion that the ruling of the circuit court on the demurrer was proper, and its judgment is, therefore, affirmed. All the judges concur.

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THOMAS H. KILLOREN, Appellant, v. CORNELIUS MEEHAN
*et al.*, Respondents. 55 427
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**St. Louis Court of Appeals, December 5, 1893.** 55 427
s68 215

1. **Building Contract:** DISCHARGE OF SURETY OF CONTRACTOR. 55 427
When a building contract provides against any material variation 102 1715
from its terms, unless the difference in the contract price resulting from the variation be first agreed upon by the parties in writing, and a material change in the work is agreed upon between the parties but not in writing, the surety of one of them will be discharged from further obligation, if he has not consented thereto.

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2. ——: ——. But the surety will not be discharged by a change in the work contracted for, which was rendered necessary solely by the negligence of his principal in the execution of the contract; nor by an independent contract made after the completion and acceptance of the work with respect to which he has bound himself.

3. **Practice, Appellate:** REVERSAL OF ENTIRE JUDGMENT. The plaintiff herein, who was a surety on the bond of a contractor for a building, sued to enforce a mechanics' lien for work done on the building, and recovered judgment. The defendant owner recovered judgment on a counterclaim based on the bond. *Held,* on appeal by the plaintiff, that error in the trial of the counterclaim should work a reversal of both judgments.

*Appeal from the St. Louis City Circuit Court.*—HON. J. A. HARRISON, Judge.

REVERSED AND REMANDED.

*Seneca N. Taylor, Charles Erd* and *Ed. L. Powers* for appellant.

It is not disputed that the owner and contractor could make any addition to, or omission from, the work they might agree upon, or alter or change the contract as they saw fit, without invalidating or rendering it void between themselves; but any such additions or omissions or alterations made without the sureties' consent discharges them from liability. *Warden v. Ryan,* 37 Mo. App. 470; *Fitzgerald v. Beers,* 31 Mo. App. 361; *Beers v. Strimple,* 22 S. W. Rep. 620. The stipulations of the contract, in respect to omissions and additions and changes, fix absolute limitations upon the power of the superintendent and are binding. *Beers v. Strimple,* 22 S. W. Rep. 620; *Hartupee v. Pittsburg,* 97 Pa. St. 107–119; *Ford v. United States,* 17 Court of Claims, 60; *Stewart v. Cambridge,* 125 Mass. 102; *Illinois Deaf and Dumb Institutions v. Platt,* 5 Bradw. (Ill.) 567; *Meiers v. Searl,* 30 C. L. L. J. Q. B. 9; *Russell v. LaDabanderia,* 32 C. L. L. J. C. 68. It

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cannot be contended successfully by the respondents that the additions and alterations were of such a trifling character as that the law will not regard them on the maxim *de minimis non curat lex.* It has never been held that a sum equal to $20 would fall within the maxim. Moreover, adding any substantial sum to the obligation discharges the securities. *Picket v. Breckenridge*, 22 Pick. 298; *Cherry v. Stephens*, 97 Mass. 83; *Evans v. Fortman*, 30 Mo. 449; *Bank v. Armstrong*, 62 Mo. 59; *Bank v. Fricke*, 75 Mo. 178; *Morrison v. Garth*, 78 Mo. 434; *Hood v. Taubman*, 79 Mo. 101; *Farrar v. Kramer*, 5 Mo. App. 167.

*A. R. Taylor* for respondents.

BIGGS, J.—The defendant Dunn entered into a contract with his codefendants, Meehan and Creagen, for the construction of some buildings to be erected on a lot owned by him. The houses were to be built according to written specifications and plans, and the building contract contained the further stipulation that, if they were not completed at a given time, then Meehan and Creagen should forfeit and pay to Dunn $5 for each day thereafter until their final completion. To secure Dunn in the performance of this contract, Meehan and Creagen gave an indemnifying bond, in which the plaintiff was surety.

The present action is one for work done and materials furnished by the plaintiff as a subcontractor under Meehan and Creagan in the construction of the houses, and for the enforcement of a mechanics' lien against the lot and houses. Dunn alleged in his answer, by way of counterclaim against the plaintiff as surety in the bond, that Meehan and Creagen had failed to complete the houses within the prescribed time, and that, by reason thereof, he (Dunn) was

entitled under the terms of the bond to a judgment against the plaintiff for $550. In reply the plaintiff alleged that there was "a departure from the plans and specifications for the erection of said buildings in question, made at the instance and request of said Thomas Dunn, which departure required the furnishing of other and additional material and labor in the construction of said buildings, amounting in the aggregate to $100 or thereabouts; that the superintendents for said buildings directed Meehan and Creagen, contractors, to make such changes and alterations and additions without first agreeing in writing, signed by the contractors and said superintendents, as to the cost and expense thereof, and this was in violation of the contract and bond, and discharged the plaintiff as surety on said bond; that he never consented or assented to said changes, nor did he know that such changes, additions and alterations, were being made until after said buildings were completed." The plaintiff as a further defense to the alleged counterclaim averred that, for a consideration, Dunn had agreed with Meehan and Creagen to waive all claims for delay in the completion of the houses.

On the trial the jury returned a verdict in plaintiff's favor for $507.90, and the jury also found that the plaintiff was entitled to the enforcement of his mechanics' lien. Judgment was entered accordingly. The jury also returned a verdict in favor of Dunn on the counterclaim for $500, and the court entered a judgment thereon. It is of this last matter that the plaintiff complains.

The building contract contains this clause: "The superintendent shall be at liberty to make any deviation from, or alteration in the plan, form, construction, detail and execution described by the drawings and specifications without invalidating or rendering void

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this contract, and, in case of any difference in the expense, an addition to, or abatement from, the contract price shall be made, and the same shall be determined by the architect; and, in case any such alteration or change shall be made or directed by the said superintendent as aforesaid, in the plans, drawings and construction of the aforesaid buildings, and in case of any omission or addition to said buildings being required by said superintendent, *the cost and expense thereof is to be agreed upon in writing, and such agreement is to be signed by said parties of the second part* (Meehan and Creagen) *and superintendent, before the same is done or before any allowance therefor can be claimed, and, in case of any failure to so agree, the same shall be completed upon the original plan.*"

It was developed by the plaintiff on the cross-examination of W. B. Ittner, one of the architects in charge of the buildings, that the cellar was dug six inches deeper than the plans called for, thereby entailing the additional cost of $32. Concerning this change the witness said: "As I remember, I think that (the change in the depth of the cellar) was more of a necessity than anything else. When we went to lay out the house, we found the ground low; if we had built our house as the plans showed, we would have nothing to rest it on but six inches of air, so that we just dropped our bottom six inches; it was not a change made on Mr. Dunn's request, but it had to be made." The witness also testified that, at the request of Dunn, extra work was done in the bath room, amounting to $8; shelves in the closets, $3; and a partition fence, $7; that there was no written agreement between Meehan and Creagen and the superintendents, providing for any change in the plans or for extra work or the cost thereof; that the plaintiff was not notified of the change or extra work, and that he did not assent to the same.

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On the other hand, there was some evidence tending to prove that the change in the depth of the cellar resulted from the negligence of Meehan and Creagen in making the excavation in this, that in doing the work they failed to consult the grades, thereby getting the excavation for the cellar six inches deeper than the plans called for, and that the excavation either had to be refilled or the buildings constructed with the cellars six inches deeper than the plans called for. There was evidence, to the effect that the partition fence was built by Meehan and Creagen without any orders from anyone; and that the agreement for the extra work on the closets and bath rooms was made after the completion and acceptance of the houses, and was independent of the original contract.

The court refused the following instruction, asked by the plaintiff:

"The court instructs the jury that, under the terms of the contract read in evidence, neither the owner nor the superintendents, Foster and Ittner, had any right to make any changes, alterations or additions in the work required to be done, which would increase the cost thereof, without first agreeing in writing as to the value of such additional cost, and said agreement being signed by said superintendents and Meehan and Creagen; and, if the jury believe from the evidence that there was any additional work done by said Meehan and Creagen at the instance and request of the superintendents, which increased the cost of the flats in question, and that there was no agreement entered into in writing between said superintendents on the one side and Meehan and Creagen on the other before said extra work was done, then this would release the plaintiff from any liability on his bond, and the jury should find for the plaintiff and against defendant Dunn upon his counterclaim."

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The other members of the court are of opinion that this instruction is defective, in that it ignored the defendant's evidence to the effect that the additional work on the excavation became necessary by the negligence of the contractors, and that for this reason the court was justified in refusing it. If the case had been tried on such a theory, I would readily yield to this view. But the entire record shows that the release of the plaintiff from liability on the bond was resisted upon the *sole* ground that changes might be made in the building without first fixing the cost by written agreement, as the contract provided. For this reason alone the instruction was refused. The instructions given by the court conclusively show this. Hence the suggestion, which is made for the first time in this court, that the instruction is faulty in the manner stated, is an afterthought, and, I think, should not be heeded in a review of the case.

But we are all agreed that the court committed error by giving the defendants' fifth instruction, which reads: "The court instructs the jury that by the terms of the contract and bond read in evidence the fact that alterations or extra work was done by Meehan and Creagen, the contractors on the buildings and improvements, did not impair or render void said bond, nor release or discharge the plaintiff from the obligations of said bond." As all the evidence tended to show that the alterations were made, and that the extra work was performed without any agreement in writing providing therefor, and fixing the price thereof, this instruction was clearly wrong under the recent decision of the supreme court in the case of *Beers v. Strimple*, reported in 22 S. W. Rep. 620. The court was there called upon to construe a similar contract, and the conclusion arrived at was that, before the owner or superintendent of the building was authorized under the



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contract to order changes or variations in the work, the cost thereof must be agreed to in writing, signed by the contractor and the superintendent. If it was not so agreed beforehand, and the surety on the bond of the contractor did not assent to the changes, he would be released from his obligation. The court, in passing on the question, said: "This agreement is clear, to the effect that, before there can be any alteration or change in the plans, drawings, or specifications, the cost must be agreed upon by the superintendent, on the one hand, and the parties of the second part on the other. The two sentences, taken together, confer the right to make alterations upon the superintendent, not the plaintiff; but before any alterations are made, the cost must be agreed upon in writing by him and the parties of the second part. This must be the meaning of the contract, taken as a whole, for the proposition is clearly expressed and made prominent in the contract that, before alterations or changes are made, the cost must be agreed upon in writing, signed by the parties of the second part and superintendent. * * * The finding of the referee shows that a number of changes and alterations were made, and that, too, without the knowledge or consent of the sureties. The law is well settled that a surety has the right to stand upon the strict terms of his contract, and if a variation is made without his consent, he is discharged. The principle applies to these building contracts the same as to other contracts."

The other assignments are not well taken. But, in view of a retrial, we deem it proper to suggest that to relieve the plaintiff from his liability on the bond the changes and extra work must have been authorized either by the superintendents or Dunn, and the extra work must have been performed under the original contract. Therefore, if, as a matter of fact, the change

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in the depth of the cellar was caused solely by the negligent act of Meehan and Creagen, and the partition fence was built by them without orders from anyone, and the extra work on the bathroom and the closets was performed after the completion and acceptance of the buildings and under another and independent contract between them and Dunn, then the liability of the plaintiff on the bond was in nowise affected.

As the rights of the respective parties must be settled and adjudicated at one and the same time, the error of the court in reference to the trial of the counterclaim must result in vacating the judgment altogether. Therefore, it will be set aside, and the cause remanded. All the judges concur.

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CHARLES FREYMARK, Respondent, v. MCKINNEY BREAD COMPANY, Appellant. 55 435 / 86 243

**St. Louis Court of Appeals, December 5, 1893.**

1. **Malicious Attachment:** PLEADING: AIDER BY VERDICT. The petition in an action for malicious attachment must allege either that the attachment proceeding has terminated in favor of the attachment defendant, or that it has terminated against him and that he had no opportunity to defend against it; nor is the want of such allegation cured by verdict.

2. ———: NATURE OF THE ACTION. *Held,* in the course of discussion, that the dissolution of the attachment is not sufficient in itself to sustain an action for malicious attachment by the attachment defendant; that the basis of such action is malice and the want of probable cause; and that the issue as to the want of probable cause is whether the acts and conduct of the attachment defendant were such as to warrant the belief that attachment would lie.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

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*Christian & Wind* for appellant.

The petition does not allege that the attachment suit was finally determined in favor of plaintiff, and therefore does not state a cause of action. *Mooney v. Kennett*, 19 Mo. 551-555; *Sharpe v. Johnston*, 76 Mo. 660-669; *Pixley v. Read*, 26 Minn. 80; *Vinal v. Core*, 18 West Va. 24; *Rothschild v. Meyer*, 18 Ill. App. 284; *Miller v. Milligan*, 48 Barb. 37; *Gorton v. DeAuglis*, 6 Wend. 420; *Cardival v. Smith*, 109 Mass. 158; *Wheeler v. Nesbitt*, 65 U. S. 544; *Stewart v. Saumburn*, 98 U. S. 187. As the final determination cannot be implied from facts stated, the defect is not cured by verdict. *Mooney v. Kennett*, 19 Mo. 555; *Childs v. Railroad*, 17 S. W. Rep. 955, 956.

No brief filed for respondent.

BIGGS, J.—Action for malicious attachment. There was a judgment for five hundred dollars, from which the defendant has prosecuted an appeal.

It is claimed that the petition fails to state a cause of action, in that it fails to state that the attachment had terminated in favor of the defendant therein. In actions for malicious prosecutions, which are entirely analogous, it has been held necessary to aver and prove that the prosecution complained of had ended in an acquital. *Mooney v. Kennett*, 19 Mo. 551; *Sharpe v. Johnston*, 76 Mo. 660. Mr. Drake in his work on the law of attachments states it is a general rule that, in order to maintain an action for malicious attachment, it is essential to aver and prove the determination of the attachment in favor of the defendant therein. (Drake on Attachments [7 Ed.], sec. 729.) When, however, the defendant in the attachment had no opportunity to defend against it, the action may be main-

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tained although the attachment terminated in favor of the plaintiff. (*Bump v. Betts*, 19 Wend. 421). But in either case the petition must show affirmatively that the attachment has terminated.

Some of the authorities hold that the want of such an allegation is cured by verdict. Under our practice this could not be, if such fact is one of the essential or constituent elements of the cause of action. The verdict will only make good an *imperfect* or insufficient statement of material facts. *Grove v. City of Kansas*, 75 Mo. 672.

We think it evident that the rules of pleading applicable to actions for malicious prosecutions must necessarily govern in suits for malicious attachment. As the plaintiff's petition herein failed to state either directly or inferentially that the attachment had ended favorably to him, or a state of facts tending to show that he was deprived of an opportunity to defend against the attachment, we must hold that it failed to state a cause of action and that for this reason the judgment must be reversed.

In view of a retrial we think it necessary to suggest that, if the attachment has been dissolved or otherwise finally settled in the plaintiff's favor, the truth of the alleged grounds of attachment would not be the issue. That question would be *res adjudicata*. The issue would be whether the attachment was sued out maliciously and without probable cause. *Walser v. Thies*, 56 Mo. 89; *Hayden v. Sample*, 10 Mo. 138; *Brennan v. Tracy*, 2 Mo. App. 540. Probable cause has been defined to be "belief founded on reasonable grounds." In other words, the issue would be whether the acts and conduct of the defendant in the attachment were such as to warrant the belief that attachment would lie. On the trial of such an issue, all the facts and circumstances attending the issuance of

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the writ of attachment may be inquired into for the purpose of determining whether the plaintiff in the attachment had reasonable grounds to act, but not for the purpose of determining whether the alleged grounds of attachment were true or false (authorities above cited). Upon such an inquiry it has also been decided by this court that evidence of the intentions of the the attachment debtor is inadmissible, unless it appeared that such intentions had been made manifest by some outward act, or had been disclosed or were known to the plaintiff in the attachment prior to the issuance of the writ. *Brennan v. Tracy, supra.*

With the concurrence of the other judges the judgment will be reversed and the cause remanded. It is so ordered.

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NEWMAN E. SAID *et al.*, Appellants, v. WILLIAM H. STROMBERG, Respondent.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Contracts, Validity of:** EXTRA-TERRITORIAL EFFECT OF SUNDAY LAWS. Our statutes against the performance of labor on Sunday have no extra-territorial effect, and, therefore, do not invalidate a contract which is made in this state, but is wholly to be performed beyond its limits.

2. **Validity at Common Law of Contract for Work on Sunday.** A contract for work and the transaction of business on a Sunday is not invalid at common law.

3. **Evidence:** JUDICIAL COGNIZANCE OF FACTS. Courts will notice judicially on what day of the week a given date fell.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

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*W. C. Bragg* for appellants.

No proof of the statute law of Illinois having been offered, the disposition of this cause must be governed by the common law, and at common law the contract sued upon was not invalid. *Rawlins v. West Derby*, 2 C. B., 72–80; *Bloxsome v. Williams*, 3 B. & C., 232; *Merrett & Earle*, 31 Barb. 40; 2 Parsons on Contracts, p. 757; 17 Am. Law Reg., p. 281.

*Frank A. C. McManus* for respondent.

ROMBAUER, P. J.—Touching the facts of this case there is no controversy. The plaintiffs, who had formed an association to conduct summer excursions on railroad trains running from the city of St. Louis, entered into the following contract with the defendant:

"ST. LOUIS, Mo., June 16, 1892.

"We, the undersigned, do hereby sell the bar privileges on our railroad excursion to Cereal Springs, Ill., Sunday, June 26, 1892, to Mr. W. H. Stromberg, for the sum of $70, the baggage car to be put in middle of train; otherwise, only $60. No gambling device allowed. All privileges allowed such as Mr. Stromberg may see fit to carry, except as above mentioned.

"N. E. SAID, Chairman Winona Club."

"ST. LOUIS, June 16, 1892.

"Received this day of W. H. Stromberg, on account of bar privileges to Cereal Springs, Sunday, June 26, twenty dollars ($20).

"N. E. SAID, Chairman Winona Club."

On Sunday, June 26, defendant's outfit was loaded into a baggage car in the city of St. Louis, the door locked by Said, and the key retained by him until the car reached East St. Louis, in the state of Illinois. The excursion train started from the latter place. The

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defendant never paid the balance of $50. There was no evidence in the case, either direct or inferential, to the effect that any part of the contract was to be performed in the state of Missouri, nor was there any evidence that the contract contemplated a violation of the statute laws of the state of Illinois, since the statute laws of that state were not in evidence.

This being all the evidence, the court, upon plaintiffs' request, first declared the law to be:

"1. If a contract can be performed without any violation of law, it is a legal presumption that it will be so performed; or, at least, there is no presumption that it will not be so performed.

"2. The burden is on him who seeks to show the invalidity of a contract, which is valid according to its expressed terms."

"3. Before the contract in suit can be declared void for illegality, it must be shown that a performance of it would be unlawful in the state where it was to be performed."

The court then rendered a judgment for the defendant, whereupon plaintiffs took this appeal.

We are at a loss to see how this judgment can be sustained. The declarations of law made by the court are unquestionably correct, and, when applied to the uncontroverted evidence, would logically result in a judgment for plaintiff. *Sheffield v. Balmer*, 52 Mo. 475; *St. Louis Agr. & Mech. Ass'n v. Delano*, 37 Mo. App. 284; affirmed, 108 Mo. 217. There is nothing, either upon the face of the paper or in the evidence, to show that the contract, or any part thereof, was to be performed on Sunday in the state of Missouri. Our statutes touching the illegality of a sale of goods, or performance of labor on Sunday, have no extra-territorial force. As the statute law of the state of Illinois touching Sunday labor and sales was not in evidence,

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that law, as far as it rests on statute, is not proved. On the other hand, if the question is one to be determined by the common law, there would be no illegality in the sale or labor; because, while the common law declared that no judicial act could be legally performed on Sunday, as to all other acts it made no distinction between Sunday and other days of the week. 2 Parsons on Contracts [7 Ed.], 757, note *n*, and *c. c.* We take judicial notice of the fact that the sixteenth day of June, 1892, when the written contract was made and delivered, fell on a Thursday.

It results that the judgment must be reversed and the cause remanded. All the judges concur.

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OCTAVIA WETMORE, Appellant, v. JAMES N. CROUCH *et al.*, Respondents. 55 441 / 65 507 / 55 441 / s150m 680

**St. Louis Court of Appeals, December 5, 1893.**

**Accounting:** INSUFFICIENCY OF PLEADINGS AND EVIDENCE. The petition and the evidence in this cause are considered; the former is *held* not to state, and the latter not to establish, a case entitling the plaintiff to an accounting with respect to the profits of a speculation, into which the plaintiff and one of the defendants had jointly ventured.

*Appeal from the St. Louis City Circuit Court.*—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

*John J. McCann* for appellant.

*Selden P. Spencer* and *Dawson & Garvin* for respondents.

ROMBAUER, P. J.—This is a petition in equity for an accounting. Upon the hearing of the plaintiff's

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evidence the trial court declared that, under the pleadings and evidence, the plaintiff was not entitled to the relief prayed for, nor to any relief. The plaintiff thereupon took a voluntary nonsuit, and, upon the refusal of the court to set it aside, brings the case here by appeal. The defendant now contends that there was no error in the ruling of the court, because the plaintiff's petition states no cause of action for an accounting, and her evidence substantiates none. The plaintiff takes issue on both these propositions.

So much of the petition as bears upon the first inquiry is as follows:

The plaintiff states, "that defendants James N. Crouch and Mary E. Crouch are husband and wife, and that plaintiff is half sister to the latter; that, in the summer of 1888, plaintiff and said James N. Crouch entered into an agreement to buy between them and speculate on a half interest in an option on certain real estate, situated in St. Louis county, Missouri, then known as the 'Benton farm,' plaintiff furnishing all the money used in the enterprise, said James N. Crouch engaging his business experience, labor and skill therein; that the amount thereupon furnished by plaintiff was the sum of $250, and that shortly thereafter said James N. Crouch succeeded in securing said one-half interest in said option, paying therefor said sum of $250; that shortly afterwards, in or about August, 1888, the Kenwood Investment Company, a corporation organized under the laws of Missouri, purchased said Benton farm at an advance of a large amount, to-wit, the sum of $15,000, over and above the purchase price named in in the option aforesaid, said James N. Crouch using said option in the transfer from the original owners of said Benton farm to said corporation; that the promoters of said Kenwood Investment Company allowed plaintiff and said James N. Crouch shares of stock in

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said corporation, of the par value of $6,500, as their share of the capital stock of said company, accruing to them from the use and management of said option from its acquisition to the purchase by said corporation of said Benton farm; that $1,000 par value of said stock was thereupon received by said James N. Crouch in his own name, and $5,500 par value thereof in two certificates, of $5,000 and $500 respectively, by plaintiff in her own name, said James N. Crouch at the same time paying to plaintiff the sum of $250, and requesting and receiving from her the receipt which he originally gave her for the same; that on the same day plaintiff received the two certificates aforesaid, she was requested by said James N. Crouch to assign the one for $5,000 to defendant, Mary E. Crouch, which, in the belief that it was in furtherance of the original agreement between her and him, she at once complied with, asking or receiving no consideration therefor at the time; that subsequently, in May, 1889, said James N. Crouch proposed to plaintiff to pool all the stock in said corporation owned by them and realize upon the same, to which plaintiff consented."

The petition then goes on to state that all the stock was transferred by the defendant Crouch to third parties, and that he received in exchange therefor a house and lot and $2,100 in money; that out of "the $2,100 received by said Crouch as aforesaid, he then and there gave to plaintiff the sum of $400 in a pretended settlement of the profits of the purchase and management of the option aforementioned, which she then and there accepted; but plaintiff further states that she was in utter ignorance of her rights at the time said settlement was made; that she relied implicitly on said James N. Crouch, who was well acquainted with her for years, who had previously been befriended by her, and who was related to her through his wife,

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to make a full, fair and just settlement; that she at no time advisedly waived any of her rights under the original agreement first mentioned; that a portion of said original agreement was that, in case the original investment of $250 was lost, said James N. Crouch would refund to plaintiff one-half the amount thereof, while, if it proved profitable, *both he and the plaintiff were to make considerable profit out of it.*"

The petition concludes with a prayer that the pretended settlement between plaintiff and defendant, James N. Crouch, be cancelled and set aside; that said James N. Crouch be ordered to account to plaintiff for an equal one-half portion of the original profits of the original agreement hereinbefore first referred to, and for other relief.

The petition is very inartificially drawn, and it is difficult to glean from it what it intends to charge as to the character of the business relations created between the plaintiff and the defendant Crouch by their engaging in the venture mentioned. It is evident at first glance that no partnership is charged, because, in order to create that relation in this state, a mere participation in profits and losses of the business does not suffice. There must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, and dispose of the whole property, a right which upon the dissolution of the partnership by death of one passes to the survivor, and not to the representatives of the deceased. *Donnell v. Harshe*, 67 Mo. 170; *Musser v. Brink*, 68 Mo. 242; *Newberger v. Friede*, 23 Mo. App. 631, 637, and cases cited. The case of *Lengle v. Smith*, 48 Mo. 276, on which plaintiff relies, is irreconcilable with the later cases decided by the supreme court. As we stated in *Newberger v. Friede, supra*, "we are bound to follow the last controlling decision of the

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supreme court on the subject, and to regard *Donnell v. Harshe* as overruling *Lengle v. Smith.*"

As no partnership is charged in the petition, either expressly or by implication, the question arises what other facts does the petition charge which would entitled the plaintiff to an account in equity for a definite amount. The petition does not state what the original contract between the plaintiff and the defendant, Crouch, was, any further than "that they entered into an agreement to buy between them and speculate on a half interest in an option in certain real estate," and, further, that in case the original investment of $250 (which the plaintiff furnished) was lost in the venture, said Crouch would refund to the plaintiff one-half thereof, while, if the venture proved profitable, "he and plaintiff were to make considerable profit out of it." The petition nowhere charges, either expressly or (in the absence of an allegation of partnership) by necessary intendment, that the plaintiff and Crouch were to derive the profit arising from the venture share and share alike. It does charge in a blind way that the plaintiff did receive $400 in settlement of her profits of the venture, and that she seeks to set aside that settlement, but it nowhere charges that this settlement was brought about by any fraud or misrepresentation on the part of Crouch, or that the $400 were not a considerable profit on an investment of $250. The sum and substance of the petition is, that the plaintiff gave to the defendant $250 to invest in a joint venture, out of which, if it proved profitable, she and the defendant were to make considerable profit; that if, on the other hand, it proved unprofitable, she was to have half of the money returned to her; that subsequently in settlement of her share of the profits the defendant gave her $400, but that this settlement should be set aside as inequitable, and she should be

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let into a full participation to the extent of one-half of all the profits.

The true test of the sufficiency of a petition is whether, if all the facts therein stated are true, the plaintiff is entitled to any relief. It is evident that all the facts stated in this petition might be true, and yet the plaintiff would be entitled to no relief. The petition nowhere shows what the share of the plaintiff in the profits was to be, except that it was to be *considerable,* nor does it show that the settlement of her profits, when made, was brought about by fraud or misrepresentation. The court would have been justified in sustaining the defendant's objection to the introduction of any evidence under this petition, and hence was justified in declaring that, under the *pleadings* and evidence, the plaintiff was not entitled to any relief.

The plaintiff was the only witness who testified orally at the trial. She stated the transaction substantially the same as it was stated in her petition. She said in addition that nothing was said as to the ratio of division of the profits, except that the defendant said in a laughing way, "he would like to limit me." When the $6,500 of stock, of which $6,250 represented the profit of the venture, was received, the defendant gave to the plaintiff $500 of it, retained $1,000 in his own name and $5,000 in the name of his wife. He said to the plaintiff that he would not be willing to give her less than $500. The plaintiff afterwards transferred her $500 of stock to the defendant to enable him to pool it with his stock in trading the entire amount to a third party. After the trade was consummated, the defendant paid to the plaintiff $400, stating that that represented the proceeds of her stock, less amounts for expenses and taxes. It appeared affirmatively from the plaintiff's own evidence that she at no time prior

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to the institution of this suit claimed more than what she received, nor sought an explanation from the defendant why he did not give her more than the $500 of stock out of the $6,500. When the $400 was paid to her, she made no reply at all; she simply took the money. The plaintiff's testimony places it beyond any doubt that she knew what the profits of the original venture were, and that, in receiving the $500 of stock in the first instance, and the $400 of money subsequently as proceeds of such stock, she knew that it represented the amount which the defendant intended to give to her as her share of the proceeds of the venture; still she made no objection and asked for no explanation. The plaintiff's evidence, and that of a witness who testified by deposition that the defendant had made a statement to him subsequently to the settlement, that "by rights the plaintiff should have had one-half of what the defendant made, but that plaintiff very generous and did not ask for it," was all the evidence in the case.

It will be thus seen that the evidence was no broader than the petition, and furnished no basis for a right to an account. Independent of the defendant's admission last above quoted, the plaintiff's evidence tends to negative any promise, express or implied, to pay to her any definite amount of her share of the venture beyond the amount which she had already received. Whether the defendant's admission last above quoted could be made available in an action at law for conversion, or in an action for money had and received by the defendants to plaintiff's use, we need not speculate upon, as this is not such an action. As the basis of an independent promise furnishing a right to an account, it is clearly unavailable, because it contains no promise, because the statement was not made to the plaintiff, and because it was made after the set-

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tlement was had which the plaintiff now seeks to set aside. Neither has the statement, taken as a whole, any tendency to show fraud in the settlement.

We fail to see, therefore, either in the plaintiff's petition or in the evidence adduced in support thereof, any ground for equitable relief. No partnership is alleged or shown; hence, equitable relief cannot be invoked on the ground of partnership account. No fraud in the alleged settlement is charged or shown; hence there is no claim presented for equitable relief on that ground. Touching the only allegations calling for equitable relief in the petition, namely, the setting aside of certain conveyances for fraud, there is not a particle of evidence in the record. It nowhere appears that, if the plaintiff has any right, she has not an adequate remedy at law.

Seeing no error in the record, the judgment is affirmed. All the judges concur.

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## STATE *ex rel.* MATTHEW SMITH, Respondent, v. J. C. ROEVER *et al.*, Appellants.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Chattel Mortgages:** EFFECT OF POWER OF SALE ON PART OF MORTGAGOR. To render a chattel mortgage constructively fraudulent, a power of sale or substitution on the part of the mortgagor must be reserved at the time of the execution of the mortgage; if conferred subsequently thereto, it will not have that effect.

2. ——: CONSTRUCTIVE FRAUD: EFFECT OF ACTUAL DELIVERY OF CHATTELS TO MORTGAGEE. A chattel mortgage which is only constructively fraudulent is purged of the fraud, if the mortgagee rightfully takes possession of the mortgaged property prior to any levy on it under process against the mortgagor.

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*Appeal from the St. Louis City Circuit Court.*—Hon. Daniel Dillon, Judge.

Affirmed.

*Henry B. Davis* for appellants.

Appellants' first and second instructions should have been given. The assent by Smith to the sale by O'Brien of the eight cows and one horse, not with the purpose of turning over the proceeds to Smith on account of his debt, but to use them to purchase other stock to be the property of the mortgagor, subject to the mortgage, and that the mortgagor should exercise the power of disposition of the property, had the same effect in showing the intention of the parties, as if such a provision had been incorporated in the deed originally. *Thompson v. Foerstel*, 10 Mo. App. 290; *Hepburn v. Mueller*, 10 Mo. App. 87; *State v. Jacob*, 2 Mo. App. 297; *Eby v. Watkins*, 39 Mo. 27; *Bullene v. Barrett*, 87 Mo. 185.

*John P. Leahy* for respondent.

Biggs, J.—This is an action on an indemnifying bond, in which the relator recovered a judgment for $179.35. There is no conflict in the evidence touching the following facts. One the first day of July, 1892, one Thomas O'Brien was indebted to the relator in the sum of $471, for which on that day he executed his promissory note to the relator, due six months after date, with six per cent. interest from date. To secure this note O'Brien, on the same day, executed a chattel mortgage on certain milch cows, horses and a wagon, which mortgage contained the usual covenants, that



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O'Brien should remain in possession of the property until the maturity of the note, unless he attempted to remove or sell the property, or unless there was an unreasonable depreciation in its value, in which cases the relator was authorized to take possession. The mortgage was filed for record on July 15, 1892. A few days after the last mentioned date O'Brien, who was at the time engaged in running a dairy, sold some of the cows which were not giving milk and also a horse embraced in the mortgage. He pocketed the proceeds and absconded. The relator admitted that he consented to this sale upon the promise that O'Brien would either pay to him the proceeds, or invest the money in cows that were giving milk. O'Brien left no one in charge of his property, and, as there was nothing for the stock to eat, and O'Brien's whereabouts were unknown to the relator, the latter took possession of the property under his mortgage. Afterwards, on the first day of August, 1892, the defendants, Roever and Storbeck, sued O'Brien by attachment, and the constable under their orders seized two of the horses covered by the mortgage. At the time of the levy one of the horses was in the actual possession of the relator, and the other was in the possession of a third party, to whom the relator had delivered it on trial with a view of its sale. Thereupon the relator gave the constable notice of his claim to the horses, and the defendants executed the bond in suit.

The answer was to the effect that the mortgage was constructively fraudulent as to the creditors of O'Brien, and also that it was executed for the purpose of hindering, defrauding and delaying them in the collection of their debts.

The defendants asked, and the court refused to give, the following instructions, of which complaint is now made.

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"1. The court declares the law to be that, if O'Brien with the consent of Smith, the plaintiff herein, sold any of the property mentioned in the mortgage read in evidence, and did not or was not to account to Smith for the proceeds thereof, then the jury will find for the defendants, notwithstanding the jury may further find that said O'Brien agreed with Smith that new property would be bought with the proceeds and that said new property would be covered by the mortgage.

"2. The court declares the law to be that, if the relator Smith, the plaintiff herein, agreed with O'Brien that any of the property covered by the mortgage should be sold by O'Brien, and that the money so obtained was to go to the purchase of new property which should be covered by the mortgage, then the jury will find for the defendants."

There was no evidence tending to prove any actual fraud as to the relator's debt, nor as to the execution of the mortgage, so that that view of the case may be put aside.

It is urged that, under the decision of the Kansas City Court of Appeals, in the case of *Smith v. Ham*, 51 Mo. App. 437, the instructions of the defendants ought to have been given. The decision referred to seems to hold that when, subsequently to the execution and delivery of the mortgage, the mortgagor with the consent of the mortgagee sells the mortgaged property or substitutes other property in its place, the court should peremptorily instruct the jury that the mortgage was constructively fraudulent as to the other creditors of the mortgagor. We can not concur in that view of the law. We are of the opinion that, to render a chattel mortgage constructively fraudulent, the right of the mortgagor to sell or substitute other property must have entered into the original agreement. If extrinsic evidence is relied on to show such an understanding,

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subsequent sales or the substitution of other property by the mortgagor with the knowledge and consent of the mortgagee would only be evidence to be considered by the jury in determining whether the right of sale or of substitution was reserved to the mortgagor at the time the mortgage was executed. *Jennings v. Sparkman*, 48 Mo. App. 246; *Bullene v. Barrett*, 87 Mo. 186.

However, under no view of the law would the court have been authorized to give the instructions which the defendants asked, for the reason that all of the evidence tended to show that, at the time of the levy of the writ of attachment, the relator was rightfully in possession of the property as mortgagee. The adjudicated cases in this state hold that a mortgage which is only constructively fraudulent is purged of the fraud, if the mortgagee prior to the seizure by the creditor has rightfully taken possession of the property. *Nash v Norment*, 5 Mo. App. 545; *Greeley v. Reading*, 74 Mo. 309; *Dobyns v. Meyer*, 95 Mo. 132; *Manhattan Brass Co. v. Webster Co.*, 37 Mo. App. 145; *Joseph, Nelke, & Co. v. Boldridge*, 43 Mo. App. 333; *Koppelman Furniture Co. v. Fricke*, 39 Mo. App. 146.

The objection, that the judgment is excessive, was not urged in the motion for new trial. Although the point is not properly before us, we have looked into the evidence and found that the judgment is less than the balance due on the relator's demand, and it is within the limits of the relator's evidence as to the value of the horses.

Neither has the defendant any room to complain of the relator's instructions. The one as to the measure of damages is faulty, in that it fails to authorize the recovery of interest on the damages assessed. This error was against the relator. The other instructions stated correctly certain propositions of law which may

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not have been necessary, but they were certainly not prejudicial.

With the concurrence of the other judges the judgment of the circuit court will be affirmed. It is so ordered.

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JOHN BUSSO, Appellant, v. ANTON FETTE, Respondent.

**St. Louis Court of Appeals, December 5, 1893.** 55 453 / 57 19 / 60 199

**Mechanics' Liens:** SUFFICIENCY OF ACCOUNT. A lumping charge in an account filed as a mechanic's lien, though not accompanied by any detailed statement of the work for which it is made, is sufficient, when it is a fact, and the account on its face shows, that there was a special contract for the work at the amount of the charge, and when, moreover, the action for the enforcement of the lien is based upon the contract, and not upon a *quantum meruit.* Especially is this true, when the lien is filed by an original contractor as distinguished from a subcontractor. 55 453 / 94 171

*Appeal from the St. Louis City Circuit Court.*—HON. LEROY B. VALLIANT, Judge.

REVERSED AND REMANDED.

*John J. McCann* for appellant.

*F. A. C. MacManus* for respondent.

BIGGS, J.—Action to enforce a mechanics' lien. On the trial the court refused to allow plaintiff to read his lien paper in evidence for the reason that, in the opinion of the court, it failed to answer the requirements of the statute, in that the statement of the account was too indefinite. The court, sitting as a jury, found for the plaintiff in the sum of $385.54, and judgment was entered against the defendant for that amount. The court also found that the mechanic's lien had not been

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established. The plaintiff has brought the case here by appeal, and the sole question arising under the record is the correctness of the ruling of the circuit court as to the sufficiency of the lien paper.

The plaintiff alleged in his petition, and his evidence tended to prove, that he made a contract with the defendant, who was about to commence the erection of a building on premises owned by him, to do the stone work on the house, consisting of "cut stone, rubble masonry and range material," and to furnish the necessary materials therefor, for the sum of $364; that he fully performed the work, and that he also did extra work at the request of the defendant, which was reasonably worth $25. The court held the petition to be bad as to the item for extra work, and the parties proceeded to trial on the other item of the account.

That the lien paper was properly filed within the time prescribed by law is not disputed. It reads:

"STATE OF MISSOURI, }
} ss.
"City of St. Louis. }

"The undersigned, John Busso, states that he was the original contractor with Anton Fette, hereinafter mentioned, for the furnishing and setting of cut stone, rubble masonry and range material, and labor in setting same, in the erection of a certain new two-story building situated on lot number 30, as represented in the amended plat of Gartside's subdivision in the Prairie Des Noyers fields, and in city block number 5016 of the city of St. Louis, state of Missouri, having a front of fifty feet on the west line of Alfred avenue, by a depth running westwardly, between parallel lines, of one hundred and fifty-two feet, six inches to an alley; that Anton Fette aforesaid was, and is, the owner of said house and lot at the time the contract with affiant was made, and now; that the materials and labor men-

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tioned were furnished and rendered at his special instance and request, and that the following is a just and true account of the demand due affiant after all just credits have been given therefor, to-wit:

"To material and labor furnished and rendered thereupon, as per original bid and contract, $364.

"To materials and labor furnished and rendered thereupon, extra or change in plans, $25.

"That the work was begun, to-wit, on March 16, 1892, and was finished and the indebtedness accrued April 5, 1892, and that the sum of three hundred and eighty-nine dollars ($389), is due said Busso from said Fette for and on account of the premises.

"JOHN BUSSO.

"The above named John Busso, being duly sworn, on his oath says that the matters and things stated in the above and foregoing statement are true.

"JOHN BUSSO.

"Sworn to and subscribed before me this eighteenth day of May, 1892. My term expires thirty-first of October, 1893; witness hand and seal.

"ALSTON L. RYLAND, [SEAL]
"Notary Public."

Under the decision of the supreme court in the case of *Rude v. Mitchell*, 97 Mo. 365, and that of *Hilliker v. Francisco*, 65 Mo. 599, both of which involve the sufficiency of mechanics' lien accounts, it is made difficult to apply the law in some cases. The objectionable item in the Hilliker case reads: "To Junction City. Stone furnished First National Bank, as per contract, $7,790." This was held sufficient to satisfy the statute. The main item in the Rude case reads: "1892. Dec. 1st. For alterations and additions to buildings Nos. 210 and 212 N. Third St., as per plans and specifications, $22,287." Then followed

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various other items for extra work. The statement of this account was held to be too indefinite.

The court in its opinion in the Rude case approved its previous ruling in the Hilliker case, and undertook to distinguish the cases. In referring to the Hilliker case, Judge BLACK said: "The suit was one by the subcontractor, and there was evidence to show that the bank had agreed with the contractor to the sum of $7,000 as compensation to the plaintiffs for the material and labor mentioned in the item. Under these circumstances it was held that the item was sufficiently specific. The item there in dispute, it will be seen, related to the stone work and labor of setting only, and the price is given. In the present case the first item is for $22,287, and there is nothing to show, on the face of the account, what is, or what is not, intended to be included."

It seems to us that another distinctive difference between the two cases, and which perhaps would require greater particularity in the statement of one account than the other, is, that the recovery in the Hilliker case was on a special contract, in which the parties had agreed on a lumping price for the work which was actually performed and which was designated in the account, whereas in the Rude case the recovery was on a *quantum meruit*,—the referee holding that there could be no recovery under the contract for the reason that the difference in the price for the alterations and extra work had not been fixed by the architects as the contract required.

In the case at bar the lien paper states that there was a special contract with the owner of the building to furnish the stone and other materials, and do the necessary work for the "cut stone, rubble masonry and range material," in the construction of the house for the sum of $364. The petition stated the same

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facts, and the plaintiff introduced evidence tending to prove the averments, and also that he had fully performed the contract on his part. It seems to us that this is a stronger case on the facts in favor of the lien than that of *Hilliker v. Francisco*. There Hilliker was a subcontractor. Here the plaintiff is an original contractor. The object of the statute, which requires an itemized statement of the account, is to notify the owner, and other parties interested in the property sought to be charged with the lien, of the nature of the work and the amount of the claim, to enable them to inquire into the validity of the claim as an incumbrance. As there is no one to be affected in the case at bar but the plaintiff, what additional information would a more particular statement (if such a thing had been possible) have conveyed to him? Certainly none. Even as to third persons there is sufficient in the lien paper to show that the defendant had agreed to pay to plaintiff the sum of $364 for stone work in the building, including materials and work, and that the work had been performed and not paid for. It seems to us that this case falls within the principle of the *Hilliker-Francisco case*, and must be governed by it.

With the concurrence of the other judges the judgment of the circuit court will be reversed and the cause remanded. It is so ordered.

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J. HUGO GRIMM, Respondent, v. DUNDEE LAND AND INVESTMENT COMPANY, Appellant.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Justices' Courts:** WAIVER OF OBJECTION TO WANT OF JURISDICTION. The doctrine, that jurisdiction over persons may be conferred by consent or waiver, is applicable to justices' courts.

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2. **Practice, Trial**: INSUFFICIENCY OF OBJECTION TO EVIDENCE. Objection to the admission in evidence of a letter as a whole is insufficient, when a portion of it is competent.

*Appeal from the St. Louis City Circuit Court.*—HON. J. A. HARRISON, Special Judge.

AFFIRMED.

*Dawson & Garvin* for appellant.

(1) The justice had no jurisdiction because of the local character of his statutory powers and the locality of the residences of the parties, plaintiff and defendant. The statute prescribes the limits of his jurisdiction. Revised Statutes, 1889, sec. 6126; *Burns v. Lidwell*, 6 Mo. App. 194: *Bast v. Ketchum*, 5 Mo. App. 433; *Clarkson v. Guernsey, etc. Co.* 22 Mo. App, 111; *Jewett v. Railroad*, 38 Mo. App. 50; *United States, etc. Co. v. Reisinger*, 43 Mo. App. 574; *Hausberger v. Railroad*, 43 Mo. 200; *State v. Metzer*, 26 Mo. 66; *Iba v. Railroad*, 45 Mo. 475; *Fare v. Gunter*, 82 Mo. 524; *Rohlank v. Railroad*, 89 Mo. 183; *Hamilton v. Millhouse*, 40 Iowa, 75; Murfree's Justice Practice, sec. 213. An appearance of the defendant did not, and consent of parties cannot, give the justice jurisdiction, or any greater powers in this case than is conferred expressly by the statutes. *Chapman v. Morgan*, 2 G. Gr. 374; *Smith v. Simpson*, 80 Mo. 639; *McMeans v. Cameron*, 51 Iowa, 691; *Thurston v. Wilkinson*, 65 Ga. 557; *Mitchell v. Braswell*, 59 Ga. 534; *Dodson v. Scrogg*, 47 Mo. 287; *Boyer v. Moore*, 42 Iowa, 544; Brown on Jurisdiction, sec. 36, note 2; Murfree's Justice Practice, sec. 227; *Gregg v. Railroad*, 48 Mo. App. 499; *Christian v. Williams*, 111 Mo. 429. (2) The judgment should be reversed for errors committed by the trial court in admitting illegal evidence.

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*Hammond v. Beeson*, 112 Mo. 201; *Ebersole v. Rankin*, 102 Mo. 500; *State v. Whelehon*, 102 Mo. 18; *Brownfield v. Ins. Co.*, 35 Mo. App. 55; *Fowle v. Stevenson*, 1 Johns. Cas. 110; *Tuttle v. Hunt*, 2 Cowen Rep. 436; *Champlin v. Filley*, 3 Day, 303; *Pennfield v. Carpenter*, 13 Johns. Rep. 350; *Rutledge v. Railroad*, 110 Mo. 318.

*J. Hugo Grimm* for respondent.

Even if the act of 1883 was repealed, which is denied, still the defendant has waived any objection to the court's jurisdiction over its person, *first*, by appearing and defending before the justice; *second*, by taking an appeal to the circuit court and there again trying the case on its merits, *Bornschein v. Fink*, 13 Mo. App. 121, 123; *Gibbs v. Railroad*, 11 Mo. App. 459; *Gant v. Railroad*, 79 Mo. 502; *Kelly v. Railroad*, 86 Mo. 682; *Fitterling v. Railroad*, 79 Mo. 504; *Boulware v. Railroad*, 79 Mo. 494; *Berkley v. Kobes*, 13 Mo. App. 502; *Rice v. Railroad*, 30 Mo. App. 110; *Fair v. Gunter*, 82 Mo. 523; *Blackman v. Cowan*, 11 Mo. App. 588; Revised Statutes, 1889, secs. 6123, 6125, 6326, 6328, 6339. As to the meaning of "jurisdiction of subject-matter," see *Dowdy v. Wamble*, 110 Mo. 284.

Rombauer, P. J.—This action was instituted before a justice of the peace in the city of St. Louis, its object being the recovery of damages for breach of a contract of sale. The defendant appeared before the justice in obedience to a summons, and defended the action on its merits. Upon being defeated the defendant appealed to the circuit court, where it was again defeated; and it now prosecutes the present appeal.

It was admitted on the trial in the circuit court that the defendant did not reside in the judicial district of the justice, nor in an adjoining judicial district, and

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had no office in either of them. The defendant moved to dismiss the cause for want of jurisdiction, but the motion was overruled by the court, and this ruling is now complained of as error.

This assignment of error is based on the assumption, that section 6126 of the Revised Statutes of 1889 is an express repeal of the act of 1883, page 103, which conferred on justices within the city of St. Louis, jurisdiction co-extensive with the city, regardless of the defendant's residence. We need not discuss the merits of that argument, as the point does not call for a decision on the record before us. It nowhere appears that the plaintiff did not reside in the judicial district of the justice before whom the cause was tried, nor that the defendant was not found therein. The defendant is a corporation and as such can have no fixed residence in any district; and it does not appear that its president, who by law is the proper person to be served, was not found in the judicial district of the justice. Revised Statutes, 1889, section 2527; *Mikel v. Railroad*, 54 Mo. 145. The record merely recites that the summons was returned duly served. But, even if this objection were out of the way, the defendant's position would not be mended, because it is affirmatively shown by the record that it appeared before the justice and went to trial upon the merits of the action. By so doing the defendant waived any objection to the jurisdiction of the justice over its person, since the action was transitory. The position now taken by the defendant, that, as to tribunals of limited and statutory jurisdiction, even the jurisdiction of persons becomes jurisdiction of subject-matter, is untenable both on principle and authority. The case of *Fare v. Gunter*, 82 Mo. 522, impliedly decides that, even where the justice has no jurisdiction of the person of the defendant, because he resides in another township, an appearance to the

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merits waives the objection to the jurisdiction. We cannot see how the law could be otherwise without giving rise to the most interminable confusion, since the statute does not require either the constable who serves the writ, or the justice who tries the cause, to state the *residence* of the defendant, and we take judicial notice of the fact that this is never done.

Upon the trial of the merits the plaintiff gave evidence tending to show that he purchased of the defendant a lot of land at auction sale, and at the time of his purchase deposited $50 as earnest money with the defendant. It was conceded that the defendant at the time gave to the plaintiff a memorandum of the sale, executed by its duly authorized agent and stating that the sale was at the rate of $25 per front foot. The plaintiff was always ready to consummate the transaction on that basis, but the defendant insisted that the sale was at $25.50 per front foot, and declined to tender a deed to the plaintiff for the purchase price as it was claimed to be by plaintiff. The settlement of this controversy dragged on for some time, and when the plaintiff finally consented rather to pay the additional fifty cents per front foot than to lose the benefit of his bargain, the defendant sought to impose upon him conditions as to the payment of interest which were not contained in the prospectus of the sale. The plaintiff also gave evidence tending to show that the market value of the lot sold to him by the defendant was, at the date of sale, $30 per front foot or more.

On the other hand, the defendant's evidence tended to show that the sale was made at a price of $25.50 per front foot, and that the memorandum of sale delivered to the plaintiff, which stated the price at $25, was a mistake of the scrivener. The defendant also gave evidence tending to show that it was always ready to

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convey the property to the plaintiff upon his complying with the terms of the sale at $25.50 per front foot.

The court instructed the jury in substance that, if they believed the facts to be as shown by plaintiff's evidence, the plaintiff was entitled to recover the $50 paid by him to the defendant, and also any excess in the market value of the lot over and above the amount at which the lot was sold to him; that, if they believed that there was a mistake in good faith on part of the plaintiff and defendant as to the price of sale, then the plaintiff's recovery was limited to the $50 earnest money which he had paid; but that if, on the other hand, they believed the facts to be as shown by the defendant's evidence, then the plaintiff could not recover, and they must find for the defendant. The jury found for the plaintiff in the sum of $300, their verdict indicating that they found a sale of the lot at $25 per front foot, a breach of the contract of sale by the defendant, and a market value of the lot at $30 per front foot, the lot being one of fifty feet front.

Complaint is made of these instructions, because they submitted to the jury the plaintiff's right of recovery of the earnest money in case of mistake, whereas his statement sought only the recovery of damages for breach of contract of sale. It suffices to say in reply to this complaint that this action was instituted before a justice of the peace, where formal pleadings are not required, and that the plaintiff's statement sought to recover as well the earnest money as damages for the breach of the contract. But even if the case were otherwise, the defendant would be in no position to complain, since the verdict of the jury conclusively shows that they found for the plaintiff not on the ground of mutual mistake, but on the ground of the breach by the defendant of the contract as

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claimed in the plaintiff's statement; hence the instruction complained of, even if not warranted by the issues framed, could not have possibly misled the jury.

Complaint is also made that the court, against the defendant's objections, permitted the plaintiff to read to the jury certain letters, which he had written to the defendant's agents urging them to consummate the contract. When these letters were offered in evidence, each of them was objected to as a whole. Had the objections been confined to certain parts of them, the court would probably have sustained the objection; but, as it was, the objection was too broad, because portions of each of the letters were admissible in evidence as tending to show the readiness on part of the plaintiff to comply with his part of the agreement. Hence we must overrule this assignment of error likewise.

Complaint is also made that the court permitted the plaintiff to amend his original statement, and thereby, as the defendant claims, substantially change the cause of action. The amended statement filed in the circuit court is different from the statement filed before the justice only in setting out some evidentiary facts. The plaintiff would certainly have been at liberty to prove all the facts, which he did prove in the circuit court, under his original statement as filed before the justice of the peace. *The cause of action*, which was the breach of the contract of sale by the defendant, was in no way changed.

Finding no error in the record, the judgment, with the concurrence of all the judges, is affirmed.

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JENNIE COLLINS, Respondent, v. AUGUST B. KAMMANN, Garnishee of Progressive Benefit Order, Appellant.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Justices' Courts: FILING OF PAPERS. The filing of a paper—in this cause the contract sued upon—is its actual delivery to the officer whose duty it is to file it. The filing need not be shown by a file mark.**

2. **———: JURISDICTIONAL FACTS. It is not essential to the validity of the judgment of a justice of the peace that the jurisdictional facts should appear from his docket entries; it suffices if they appear anywhere on the face of the proceedings.**

3. **Garnishment: ASSESSMENTS BY BENEFIT SOCIETY. An assessment made by a benefit society against a subordinate lodge reached the hands of the treasurer of the lodge, whose duty it then was to immediately forward the fund to the treasurer of the society; nor did the lodge thereafter, under its own laws or those of the society, have any control over the fund. *Held*, that the fund was subject to garnishment under a writ of attachment against the society, notwithstanding that the lodge had directed its treasurer not to forward, but to hold, the same, owing to the failing condition of the society.**

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*Louis A. Steber* for appellant.

*Collins & Jamison* for respondent.

ROMBAUER, P. J.—The defendant appeals from a judgment rendered against him as garnishee of the Progressive Benefit Order. The facts, succinctly stated, are as follows: The Progressive Benefit Order is a foreign corporation, and one of its objects and charter powers is to establish a benefit and reserve fund

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from which those, who have held a certificate of membership in it for one year, may receive an amount of $100. By the general laws of the order, this $100 is payable to all who pay assessments at the rate of $2, when called for. Subordinate lodges are established, and it is provided that, whenever an assessment is made, the secretary of the subordinate lodge shall certify to the treasurer of the same the amount due on the assessment by the terms of the call. The treasurer of the subordinate lodge shall immediately forward the same to the supreme treasurer, and notify the secretary of the lodge in writing that the amount has been forwarded. Any lodge, which fails to have the amount of the assessment in the hands of the supreme treasurer within fifteen days from the date of the expiration of the call, shall be reported by the supreme secretary to the supreme president, who shall at once suspend the lodge. Assessments are made by the supreme lodge on each subordinate lodge. It is also provided by the laws governing subordinate lodges that their treasurer shall keep the general and reserve and benefit funds in separate accounts, *and not allow them to be used for any other purpose than that provided for by law.*

Prior to the institution of this suit, two assessments (numbers 27 and 28) were thus made, and the garishee, who is treasurer of the subordinate lodge known as Future Great Lodge, number 179, had $400 of moneys arising from such assessments in his possession, belonging to the relief fund. The Progressive Benefit Order being in a failing condition, the members of lodge 179 met and decided by a vote that the treasurer should not forward assessment number 27 to the supreme lodge, but hold the same for the members (of the subordinate lodge) until further orders. It was in evidence that the plaintiff was present at this meeting, but it did not appear that she participated in the pro-



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ceedings or voted on the resolution. This meeting took place on a Wednesday, and the next day the plaintiff instituted the present suit against the Progressive Benefit Order by attachment, and caused the garnishee Kammann to be summoned as its debtor.

The errors assigned by appellant garnishee are that the judgment obtained by the plaintiff against the Progressive Benefit Order is jurisdictionally defective; and that, at the date of the service of the writ of attachment, the money in the hands of the garnishee was owned by the individual members of the subordinate lodge, and not by the defendant order.

The basis of the first assignment of error is, that no statement was filed with the justice at the date of the institution of the suit; that the service by publication was insufficient; and that judgment was rendered by the justice in the main case on a day to which it had not been continued. In passing on these objections it will suffice to say that the filing of a paper is its actual delivery to the officer whose duty it is to file it, without regard to any action that he may take thereon, and the true date of the act may be shown without any file mark. *Grubbs v. Cones*, 57 Mo. 84; *Bensley v. Haeberle, Adm'r*, 20 Mo. App. 648. There was evidence in this case that the plaintiff's certificate, which was a sufficient statement of her cause of action, was delivered to the justice when the suit was brought. It was not even controverted that the certificate was filed, *and indorsed as filed*, long before the cause was tried, and that was sufficient to confer jurisdiction. Revised Statutes, 1889, sec. 6139. As to the service by publication it appeared by the constable's return that he had posted four notices, sufficient in form, in four public places in the city of St. Louis more than twenty days preceding the return day of the writ. The objection that these facts do not fully appear from the

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justice's docket entries, and, therefore, fail to show jurisdiction, is not tenable, because it suffices if jurisdictional facts appear upon the face of the proceedings anywhere. Nor is the objection tenable, that it does appear that judgment was entered in the main cause on a day to which the same was not continued. There seems to be some confusion in the justice's docket entries by mixing up those which relate to the garnishment proceeding with those which relate to the main action; but by looking at both it sufficiently appears that both causes were continued from January 29, to February 5, 1892, at which last date final judgment was entered against the Progressive Benefit Order. The first assignment of error must, therefore, be ruled against the defendant.

The validity of the second assignment of error must be determined by the answer, which, under the evidence, is to be given to the question: "Was the garnishee, at the date of being summoned as such, indebted to the Progressive Benefit Order or not; and were the funds in his hands representing the proceeds of assessments 126 and 127, a debt due to said order unaffected by liens, prior incumbrances or conditions of contract?" *Lackland v. Garesche*, 56 Mo. 267; *Sheedy v. Bank*, 62 Mo. 17; *Ritter v. Ins. Co.*, 28 Mo. App. 140. It will be seen, by referring to the laws of the order first hereinbefore set out, that, when an assessment is levied by the supreme lodge and paid to the treasurer of the subordinate lodge, it becomes the duty of the latter *to forward the same immediately to the grand treasurer.* There is nothing, either in the laws of the order or in the laws of subordinate lodges, which reserves to the latter any control whatever over the benefit fund after the assessments for it are paid into the hands of its treasurer. *Quoad* this fund the treasurer of the subordinate lodge is accountable to the

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grand lodge, and not to the subordinate lodge. It is true that, as shown by the evidence, his bond is given to the subordinate lodge, but the condition of the bond is to perform the duties of his office in accordance with the laws governing the administration thereof, and to account for the benefit and reserve fund to whoever *may be legally appointed to receive the same.* The only person legally appointed to receive said fund is the grand treasurer of the Progressive Benefit Order, while said order subsists and is engaged in the performance of its charter duties.

It thus appears that, at the date when the garnishee was summoned, he did owe to the defendant in the attachment a sum exceeding the judgment rendered against him, and that, as the defendant had called for the debt and had not revoked the call prior to the service of the garnishment, the debt was payable to it absolutely and unconditionally, and was subject to garnishment. *Birtwhistle v. Woodward*, 95 Mo. 113, 117. Since the subordinate lodge had no control over this particular fund, its action could not affect the *status* of the debt.

The judgment is affirmed. All the judges concur.

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CHARLES C. RAINWATER *et al.*, Respondents, v. H. B. BURR *et al.*, Defendants; GEORGE C. BURR, Appellant.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Partnership: COMPETENCY OF DECLARATIONS OF ALLEGED COPARTNER.** The declarations of one member of an alleged partnership in reference to its business are admissible against another, when the existence of the partnership between them has been established *aliunde* by substantial evidence.

2. **Practice, Trial: WEIGHING THE EVIDENCE.** This court will not weigh the evidence in an action at law, when there is a substantial conflict in it.

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*Appeal from the St. Louis City Circuit Court.*—Hon. Jacob Klein, Judge.

Affirmed.

*R. H. Kern* for appellant.

(1) The court committed error in admitting the testimony of Rainwater to the effect that, when he sold the goods in dispute to H. B. Burr, he represented to him that appellant, George Burr, was his partner. *Cole v. Butler*, 24 Mo. App. 76; Bates on Partnership, sec. 95; *Rimel v. Hayes*, 83 Mo. 200; *Campbell v. Hastings*, 29 Ark. 526; *Thompson v. Bank*, 111 U. S. 529. (2) The court committed error in admitting the testimony of Thompson and Evans that was objected to by appellant. *Benedict v. Davis*, 2 McLean, 347; Bates on Partnership, sec. 94.

*Merrifield W. Huff* for respondent.

(1) The evidence shows that the appellant was a partner of H. B. Burr. Appellant knew, at the time they were intending to form the partnership, that H. B. Burr was representing to others that there was a partnership existing and took no steps then or subsequently to correct this impression. *Rimel v. Hayes*, 83 Mo. 202; *Hahlo v. Mayer*, 102 Mo. 93; *Cole v. Butler*, 24 Mo. App. 76. (2) This case presents simply a question of fact which the trial court has passed upon, and the verdict will not be disturbed because of the contradictory testimony. *Mulford v. Cæsar*, 53 Mo. App. 263; *Doud v. Reid*, 53 Mo. App. 555.

Biggs, J.—The plaintiffs sued the defendants, H. B. and George C. Burr, for goods sold and deliv-

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ered. It was alleged that at the time of the sale of the goods the defendants were, and for some time previous thereto had been, conducting a gents' furnishing goods business in the city of Dallas, Texas, under the firm name of H. B. Burr & Bro. H. B. Burr made no defense. George C. Burr filed a separate answer under oath, in which he put in issue the alleged existence of a partnership between him and his brother. This was the only issue tried. The court, sitting as a jury, found in favor of the plaintiffs, and a judgment was entered against both defendants for the amount of the claim. George C. Burr only has appealed.

Against the objection of the appellant, the court permitted the deposition of C. C. Rainwater, one of the plaintiffs, to be read in evidence. The witness testified substantially that, when H. B. Burr commenced business in Dallas, he applied to the plaintiffs for the purchase of goods; that he stated that he and his brother, George C. Burr, had formed a copartnership, and were about to commence business in the city of Dallas, Texas, under the firm name of H. B. Burr and Bro.; that upon the faith of these representations the plaintiffs commenced to sell goods to the firm, and so continued, without notice of any change in the firm, until H. B. Burr made an assignment in May, 1887. Further on, in the deposition the witness said: "George C. Burr was in our place of business several times during the period in which the business was being conducted under the name of H. B. Burr & Bro. I several times said to him 'How are you getting along at Dallas?' 'How is business in Dallas?' and the like inquiries; to which he made answers to the effect that the business was good, or the like."

At the time the alleged partnership was formed, and for some time thereafter, the defendant, George C. Burr was employed as a paying teller in the Boat-

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men's bank in the city of St. Louis. There was a by-law of the bank, prohibiting any clerk from engaging in outside business. William H. Thompson, the president of the bank, testified: "Learning that Burr had an interest at Dallas, Texas, I called his attention to this by-law, and, according to my best recollection (but I won't be positive), he stated that he had an interest in business there. I told him in substance that he could readily see that one or the other would have to be abandoned—his business there or his clerkship here, and he decided, as I recollect, to abandon the former, but I am not positive. He afterwards told me he had done so, and that he no longer had any interest in the business, and that his only connection there then consisted in money loaned to his brother to carry on the business. This is my recollection, but I can't state positively as to the above statement."

Two days after the assignment by H. B. Burr, William L. Evans had a conversation with George C. Burr touching his relationship to the firm. The witness said: "I asked him (George C.) how it was that the assignment was made in the name of H. B. Burr as an individual; he said, because he was not a partner. I then asked him when he withdrew from the business; he hesitated, and said, that really he never had been a partner. Somewhere in the conversation I asked the question why he withdrew, and his reply was that Mr. Thompson objected to his having any outside connection, * * * I asked him, also, how much money he had put into that concern; he said about eighteen hundred dollars. I asked him if he had withdrawn any of that money; he said he had not. I asked him if his brother had either given him any note or paid him any money out of the concern, or given him a note for that eighteen hundred dollars that he had paid in there, and he said he had not."

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There was also testimony to the effect that, when H. B. Burr commenced the business, the firm name, "H. B. Burr & Bro.," and also the individual names of himself and brother appeared on the bill and letter heads of the concern, and George C. Burr admitted that he was in Dallas some time after the business was started, and that he saw the signs, "H. B. Burr & Bro." over the front door of the store where his brother was conducting the business.

The exception to that portion of the deposition of Rainwater, in which is stated the declaration of H. B. Burr in reference to the business of the firm and the persons composing it, must be overruled. If the admission of the testimony had not been followed by evidence *aliunde* of the partnership, the action of the court would have been clearly prejudicial. The rule is established in this state and in many other jurisdictions that after the party, who has alleged a partnership, has introduced substantial evidence that the party sought to be charged was a member of the firm, the declarations and admissions of the other members in reference to the business of the concern are admissible on the score of agency. *Campbell v. Dent*, 54 Mo. 325; *Folk v. Wilson*, 21 Md. 538; Collyer on Partnership, [6 Ed.], sections 454, 702, 775; Bates on Partnership, section 321; *McCann v. McDonald*, 7 Neb. 305; *Hilton v. McDowell*, 87 N. C. 364. That there was ample evidence tending to prove that the appellant was a member of the firm cannot he controverted. Nor can it make any difference that no such proof had been adduced at the time the deposition of Rainwater was offered in evidence. *(Campbell v. Dent, supra.)* The deposition itself contained substantial evidence of the controverted fact, which rendered the entire deposition competent evidence at the time it was offered.

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The case of *Rimel v. Hayes*, 83 Mo. 200, is not applicable, for the reason that there was no evidence of the actual existence of a partnership. The liability of of the defendants was made to depend upon an alleged "holding out" that they and one Smith were partners. The court allowed the declarations of Smith that the defendants were his partners to be proved, which the supreme court properly held to be error.

We will, therefore, overrule the first assignment.

The appellant at the close of the plaintiff's evidence, and also at the close of all the evidence, asked the court to instruct that, under the law and evidence, there could be no recovery against him. The court refused both instructions, and this is assigned for error. No other instructions were asked or given.

The appellant denied *in toto* the conversations testified to by Rainwater. He also stated that, at the time he had the conversation with the president of the Boatmen's bank, he was only considering the advisability of going into the business with his brother; and that when his attention was called to the by-law of the bank, he determined not to, and did not go into the firm. He also substantially contradicted the testimony of Evans. However, he admitted that he loaned his brother eighteen hundred dollars just before he commenced business, and that he had not taken a note or other writing as evidence of the loan. He also admitted that he was in Dallas while his brother was conducting his business, that he saw the sign, H. B. Burr & Bro., over the front door of his store room, and that he called for no explanation.

It thus appears that we have a sharp and substantial conflict in the evidence bearing on the only issue of fact that was tried. In such a case we cannot interfere. To do so, we would have to hold that the conclusion reached by the trier of the fact could not in

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reason be true. *Mulford v. Cæsar*, 53 Mo. App. 263. This assignment will likewise be overruled.

Finding no error in the record, the judgment of the circuit court will be affirmed. All the judges concur.

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O. STAFFORD CHAMBERLAIN, Respondent, v. PULLMAN PALACE CAR COMPANY, Appellant.

**St. Louis Court of Appeals, December 5, 1893.**

**Sleeping Car Companies, Liability of: CONTRIBUTORY NEGLIGENCE OF PASSENGER.** A passenger on a sleeping car, who leaves his watch in his berth while he is in the toilet room, is, as a matter of law, guilty of contributory negligence if it is stolen in his absence, and therefore cannot recover from the company for the loss; but it is otherwise if he directs the porter in charge of the car to look after his effects in his absence.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

*Dickson & Smith* for appellant.

(1) Defendant's instruction in the nature of a demurrer to the evidence should have been given, as plaintiff's own evidence established such contributory negligence on his part as should have defeated his action. *Root v. Sleeping Car Co.*, 28 Mo. App. 199; *Railroad v. Handy*, 63 Miss. 614; Thompson on Carriers, p. 531; Hutchinson on Carriers [2 Ed.], sec. 617*d*. (2) The refusal of the instructions offered by the defendants was erroneous. *Root v. Sleeping Car Co.*, *supra*.

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*Lee & Ellis* for respondent.

There was no error in the refusal of the trial court to nonsuit the plaintiff, nor in its refusal of the instructions offered by the defendant. *Root v. Sleeping Car Co.*, 28 Mo. App. 199.

ROMBAUER, P. J.—The plaintiff recovered a judgment for $300 from the defendant for the negligence of the latter's servants in not sufficiently guarding plaintiff's personal effects, in consequence whereof a valuable watch was stolen out of his waistcoat, lying under a pillow in the berth occupied by him as a passenger on one of the defendant's sleeping cars. The defendant now assigns for error that the judgment is not supported by the evidence, and that the court erred in its instructions to the jury.

The petition charged negligence only, and no fraud or felony on part of the defendant's servants. The answer contained a general denial and the plea of contributory negligence. The plaintiff, who was the sole witness on his own behalf, testified in substance that he ordered the porter to wake him at daybreak so that he might take a bath in the lady's toilet room; that the porter woke him according to order, and that he thereupon took his hand bag or valise and went to the toilet room in his night shirt, leaving his clothes in his berth; that the watch in question was in his waistcoat pocket, which was carefully folded and placed under his pillow; that upon his return, fifteen or twenty minutes afterwards, he found his waistcoat lying on the berth unfolded and the watch was gone. The plaintiff in addition stated that, when he went to the toilet room, he saw one or two men, whom he took to be train men, sitting in the forward end of the car in an unoccupied berth. The remaining berths were occupied by passengers who

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were presumably asleep at that early hour of the morning. The plaintiff was an experienced traveller, having, according to his own testimony, spent on the average one hundred and forty nights of every year for thirty years in sleeping cars.

On the question, whether he had told the porter to look out for his things while he was absent in the toilet room, the plaintiff's testimony was to the effect that he would not be positive that he told him so, but that he thought he did. The porter, who was called for the defendant, testified that he woke the plaintiff according to order, but did not see him when he got up, and had no words with him at all; that he left the body of the car before the plaintiff left his berth, and proceeded to the smoking room to clean it up, and that, when he returned to the car, he found the plaintiff dressing.

Under this evidence we must overrule the defendant's first assignment of error that the court erred in not instructing the jury at the close of plaintiff's evidence that he could not recover. There was some substantial evidence that the plaintiff had requested the porter to guard his effects in his absence, wherein this case is distinguishable from *Root v. Sleeping Car Co.*, 28 Mo. App. 199. The weight of that evidence was for the jury.

But we must sustain the defendant's second assignment of error, based upon the refusal of the following instruction asked by it: "If the jury believe under the evidence that plaintiff left the watch mentioned in evidence in his berth when he went to the toilet room to wash, and allowed said watch to remain in said berth while in that toilet room without notifying any servant of the defendant that the watch was so left in the berth, then the jury are instructed that defendant was guilty of negligence directly contributing to the loss of such watch, and they will find for defendant."

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There was no other instruction given, which presented for the consideration of the jury the plaintiff's contributory negligence, and its effect. We said in *Root v. Sleeping Car Co.*, *supra*, a case identical in many of its features with the present case: "The custody of the passenger's hand baggage and money is, saying the most that can be said in his favor, a mixed custody—partly his custody and partly that of the sleeping car company. But it is not even a mixed custody in respect of money or other small valuables which he can conveniently keep upon his person, or under his eye, while he is awake. Such a custody is the exclusive custody of the passenger, and not, in any sense, the custody of the carrier. Now, if a passenger put such articles in a situation where anybody can steal them, and goes away and leaves them there, and especially if he does this without notifying any servant of the sleeping car company that he has so left them, it must be said, as a matter of law, that he has been guilty of contributory negligence." We are aware of no case in this state that carries the liability of these companies any further than there stated. There was ample evidence to support this instruction, and the defendant was entitled to it. We see no error in other instructions given by the court, nor in the modification of the defendant's second instruction, which was unnecessary but not prejudicial.

The judgment is reversed and the cause remanded. All the judges concur.

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J. W. WALKER, Appellant, v. N. K. FAIRBANKS & COMPANY, Garnishee of D. C. HENDERSON, Respondent.

**St. Louis Court of Appeals, December 5, 1893.**

1. **Garnishment**: EFFECT OF ANSWER OF GARNISHEE. The answer of a garnishee to the interrogatories filed by the attaching creditor is evidence in his favor of all affirmative facts stated therein by way of avoidance; accordingly it casts upon such creditor the burden of rebutting the allegations made in it.

2. ———: JURISDICTION. A debt must have its *situs* within the territorial limits of the jurisdiction of a court in order to be subject to garnishment under the process of that court; and its *situs* for this purpose is the place where it is payable.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

AFFIRMED.

*Walter B. Douglas* for appellant.

A corporation organized in another state, but doing business and having property in this state, is subject to garnishment here. Revised Statutes, 1889, secs. 2538, 5218, 2009, 2010, 521; *Ritter v. Ins. Co.*, 28 Mo. App. 140; *Keating v. Refrigerator Co.*, 32 Mo. App. 297; Drake on Attachment, sec. 477; Murfree on Foreign Corporations, sec. 261; *McAllister v. Ins. Co.*, 28 Mo. 214; *Railroad v. Crane*, 102 Ill. 249. The *situs* of a debt is the place where the debt is payable, the debtor is found and subject to garnishment. *Green's Bank v. Wickham*, 23 Mo. App. 663. It being shown that the garnishee is a resident of this state for the purpose of garnishment; that the debtor was employed in this state to do work for the business conducted in the

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state under the direction of the manager of the business in this state; that his account was kept here and his salary paid by checks made here upon a St. Louis bank; such evidence, if not rebutted or avoided by other evidence, establishes the fact that the debtor's salary is payable here. The fact that the plaintiff in this case is a resident of this state makes this case widely different from the cases of *Fielder v. Jessup*, 24 Mo. App. 91, and *Todd v. Mo. Pac. R'y Co.*, 33 Mo. App. 110, where the debtor and the creditor were both residents of the same state and nonresidents of this state. *Pennoyer v. Neff*, 105 U. S. 714. An agreement to send checks to a place out of this state is not an agreement to make payment out of this state. 2 Daniel on Negotiable Instruments, sec. 1623; *Chouteau v. Rowse*, 56 Mo. 65.

*J. F. Merryman* for respondent.

In garnishment proceedings, whereby a debt is sought to be condemned, jurisdiction is determined by the *situs* of the debt, and not by the residence of the garnishee or of the debtor. *Fielder v. Jessup*, 24 Mo. App. 91. In the case of foreign attachment or garnishment the *situs* of the debt (as to jurisdiction) is where the garnishee lives, unless the debt by the terms of the contract creating it is payable in another jurisdiction. But, if it appears from an answer in garnishment, not denied, and from the proof offered, that the judgment debtor resides without this state, and that the debt due him is payable in another state, there is no jurisdiction in a court of this state to entertain the proceeding, and a judgment for the plaintiff against the garnishee is error. *Keating v. Refrigerator Co.*, 32 Mo. App. 293; *Todd v. Railroad*, 33 Mo. App. 115; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Fielder v. Jessup*, 24 Mo. App. 91.

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ROMBAUER, P. J.—Upon a trial of this cause the court rendered judgment in favor of the garnishee. All the instructions asked by the plaintiff were given, and no exceptions were saved to the admission or rejection of evidence. The garnishee asked no instructions. The only complaint made by the plaintiff is that, under the conceded facts, the court should have rendered judgment against the garnishee.

The garnishee's answer which was filed in June, 1891, admitted an indebtedness to the defendant Henderson, but stated that such indebtedness was payable in Denver in the state of Colorado. The garnishee's answer under our practice is evidence in his favor, even in regard to all affirmative facts stated therein by way of avoidance. (*Holton v. Railroad*, garnishee, 50 Mo. 151; *Ronan v. Dewes*, garnishee, 17 App. 306.) Hence it became incumbent upon the plaintiff to disprove the fact that the debt was payable in Denver, Colorado, and to prove that it was payable here, since the place where the debt is payable is its *situs*, in this class of cases, for the purpose of determining the jurisdiction of the court over it. *Green's Bank v. Wickham*, 23 Mo. App. 663.

On the trial of this cause the plaintiff disclaimed to have attached any debt payable subsequently to July, 1891. The garnishee's officers, who testified for plaintiff, stated that up to January, 1892, the employes of the garnishee, of whom Henderson was one, were paid by checks or drafts on New York city, and that such checks or drafts were invariable sent to Henderson or Henderson's wife to Denver, in the state of Colorado, where Henderson resided. It will be thus seen that, outside of the garnishee's answer, there was ample evidence to support the judgment of the court, because, if the checks or drafts were payment in themselves,

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then the *situs* of the debt was Denver, in the state of Colorado, and if the place where the checks or drafts were payable determined the *situs* of the debt, then such *situs* was New York City, in the state of New York. In neither event was the *situs* of the debt in this state. Hence, it results that the court rendered the only judgment which it could have rendered under the facts established by the plaintiff's own evidence.

All the judges concurring, the judgment is affirmed. It is so ordered.

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FRANCIS W. DROEGE, Appellant, v. ELIZABETH DROEGE, Respondent.

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**St. Louis Court of Appeals, December 19, 1893.**

**Divorce:** DESERTION. When a separation by a wife from her husband, though without justification, takes place with the tacit consent or connivance of the latter, it does not amount to desertion within the meaning of the law of divorce.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*Smith P. Galt* for appellant.

The evidence shows that defendant absented herself from plaintiff without reasonable cause for the space of one whole year before the filing of his petition, and therefore the appellant is entitled to a decree of divorce. Bishop on Marriage and Divorce [Ed. 1891], sections 1742, 1217 and 1753; 5 American and English Encyclopedia of Law, p. 205, note 2; *Pierce v. Pierce*, 33 Iowa, 238; *Skean v. Skean*, 33 N. J. Eq.; *Messenger v. Messenger*, 56 Mo. 329; *Taylor v. Taylor*, 80 Iowa, 29;



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*Van Dyke v. Van Dyke*, 135 Pa. St. 459; *Alkire v. Alkire*, 33 W. Va. 517.

*Broadhead & Hezel* for respondent.

The defendant did not absent herself from the plaintiff without reasonable cause; therefore plaintiff is not entitled to a divorce. *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. 295; *Dwyer v. Dwyer*, 26 Mo. App. 653.

Biggs, J.—Action for divorce. The plaintiff alleged in his petition that, in July, 1884, the defendant, his wife, left their home without good and sufficient cause, and that since that time she had absented herself from him without a reasonable cause. The answer is a general denial. The circuit court, upon a hearing, dismissed the proceeding, and the plaintiff has brought the case here for review.

Desertion, in the law of divorce, "is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the *consent* or the *wrongful conduct* of the other." 1 Bishop on Marriage and Divorce, section 1662. There is great diversity of opinion among judges as to what should be deemed an adequate excuse or provocation for separation. Some hold that the misconduct of the other party must be such as to entitle the party (who leaves the other) to a divorce. Others have regarded something less as sufficient, that is, where it is made to appear that the separation is the natural or probable result of irritating or vexatious conduct of the other party. The latter rule has been adopted in this state, where the defendant relies on the misconduct of the plaintiff as a *provocation merely* for the act of separation. *Gillinwaters v.*

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*Gillinwaters*, 28 Mo. 60; *Owen v. Owen*, 48 Mo. App. 208. But, if the separation is with the assent or connivance of the other party, then there is no desertion. *Lea v. Lea*, 8 Allen, 418; *Crow v. Crow*, 23 Ala. 583; *Fulton v. Fulton*, 36 Miss. 517; *Marsh v. Marsh*, 14 N. J. Eq. 315.

We do not think that, even under the more liberal rule adopted in this state, the evidence of misconduct on the part of the plaintiff was sufficient to fully justify the defendant in abandoning her home. But our reading of the record has convinced us that the plaintiff was more anxious for a separation than the defendant, and that it took place by his tacit consent, connivance and desire, as his subsequent conduct, when coupled with the testimony of the defendant, conclusively shows.

The parties were married in 1875. The defendant's mother (Mrs. Meehan) was a widow, and the owner of some property The defendant was the only child. The young couple lived with Mrs. Meehan for three or four years after the marriage, paying no board, at which time the latter moved onto her farm in Washington county. During this time two children were born of tho marriage. After Mrs. Meehan moved to her farm, the plaintiff and defendant kept house for two or three months, when the plaintiff failed in business. Being without employment or money, he moved his family to his mother-in-law's farm, and again took up his residence with her. In the fall of 1882 the farm was sold, and all parties returned to St. Louis. Mrs. Meehan bought a house, and the plaintiff and his family again installed themselves as part of her household. This continued until the spring of 1884, when Mrs. Meehan sold her house and informed the plaintiff that he must set up an establishment of his own. Up to this time the plaintiff had been married nearly nine

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years, and during the time (excepting two or three months) he and his wife and their two children had lived on the bounty of Mrs. Meehan. He paid no board, and in no wise contributed to the household expenses, although, after his return to St. Louis, he had constant employment at a salary of from $60 to $90 a month.

After Mrs. Meehan had notified the plaintiff that he must provide another home for his family, he rented three rooms and commenced to keep house in April, 1884, and he so continued until July following, when his wife went back to live with her mother, taking the children and all the furniture.

The defendant testified that, during the time they kept house, the plaintiff failed to provide a sufficient amount of food for herself and children; that he remained away almost every evening until very late hours, sometimes not returning until two o'clock in the morning, and, when she asked where he had been, he answered that it was none of her business; that he habitually treated her coldly, and exhibited no affection for the children; that just before the separation she asked him to buy her a tonic which her physician had prescribed, and that he rudely pushed her aside, remarking that she did not need any medicine; that she often complained to him of his failure to sufficiently provide for her and the children, and of his discourteous treatment of her, and that she informed him on several occasions that, unless there was a change for the better, she would go back to live with her mother, and that he always replied that she was at liberty to go whenever she desired.

On the other hand the plaintiff testified that at the time he commenced to keep house he was receiving a monthly salary of $83 with a bonus of $100 at the end of each six months for faithful service; that for

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each month he set apart $60 for family expenses, $30 of which went to his wife, $13 for rent, and the remainder ($17) for provisions and other supplies for the family; that he treated his wife well; that they had no trouble whatever; that she made no complaints; and that he was perfectly dumfounded, when he returned to his home one evening and found it deserted and dismantled, and his wife and children gone. But he confessed that he made no effort or even inquiries to find out whither they had gone, or why they had gone. He said that he was satisfied that they had gone to live with Mrs. Meehan, who had just moved into a new house which she had built. He also admitted that, a few months after the serparation, his wife sent for him to visit his daughter, who was sick; that he there met his wife, and that he did not then, or at any time during their long separation, ask his wife for an explanation of her conduct. He also confessed that during this time he had seen his children only four or five times, although they lived in St. Louis, and that he had never contributed anything towards their education or support.

The conduct of the plaintiff when he learned that his wife had gone, and subsequently, can not be made to harmonize with his statements that he had always treated his wife well; that he loved her and the children dearly; that she made no complaints; and that she had never threatened to leave him. The one is a palpable contradiction of the other, and this justified the trial court, and it warrants us, in adopting the statements of the wife as being substantially true. We think that he was fully advised of his wife's intentions, and that she acted with his tacit consent or connivance; for, in answer to her complaints of bad treatment and threats to leave him and go back to live with her mother in the event he did not treat her

better, he always assured her that she was at liberty to go whenever she was ready. He seemed to want to be rid of the burden of supporting his family, knowing full well that Mrs. Meehan could and would give them a better home than he could afford. His conduct cannot be explained in any other way.

It may be true, as we decided in an action brought by Mrs. Droege against her husband for maintenance (*Droege v. Droege*, 52 Mo. App. 84), that the circumstances attending the separation were not sufficient to make out a case of desertion on the part of the husband. That was one thing. But to hold that the act of separation was an act of desertion on the part of the wife, and that the plaintiff is an innocent and injured party is quite a different thing.

The judgment of the circuit court will be affirmed. All the judges concur.

### CONCURRING OPINION.

Rombauer, P. J.—It appears by the plaintiff's own evidence that his wife left him in July, 1884; that he knew that she had removed to her mother; that he never asked her to return, never interferred with her movements in any manner, never sought her society, or offered to make any provision whatever for her. The present suit was instituted in February, 1893. Under these circumstances the trial court was warranted in holding, under the decisions of this state, that, although the defendant's departure was unjustified, yet the plaintiff by his subsequent conduct acquiesced in the separation, and hence there was no desertion within the contemplation of the statute *at the date of the institution of the suit.* This view is in harmony with the views expressed in my separate opinion in *Dwyer v. Dwyer*, 16 Mo. App. 422, and with those

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expressed by the supreme court and the Kansas City court of appeals in *Simpson v. Simpson*, 31 Mo. 24, and *Gilmer v. Gilmer*, 37 Mo. App. 672.

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ELIZA COOK *et al.*, Respondents, v. FREDERICK VON PHUL *et al.*, Defendants; FREDERICK VON PHUL, Appellant.

**St. Louis Court of Appeals, December 19, 1893.**

**Statutory Action to Quiet Title:** WHEN IT LIES. The plaintiff in a proceeding under section 2092 of the Revised Statutes to compel the defendant to bring an action to try the title to land is entitled to the statutory relief sought, when he is in possession of the land claiming the fee, and the defendant claims an adverse and immediate interest in the property, which is capable of being at once tested by appropriate proceedings in the courts; the form of the action in which such title or adverse interest is to be asserted is not material.

*Appeal from the St. Louis City Circuit Court.*—HON. JACOB KLEIN, Judge.

AFFIRMED.

*Vernon W. Knapp* and *Wm. B. Thompson* for appellant.

Where the alleged adverse claim does not conflict with the possession or right of possession of the plaintiffs, and the defendant can bring no action at law to settle the title, the case is not within the provisions of the statute, unless plaintiff show that the alleged adverse claim is such as may be asserted in a court of equity entitling claimant to affirmative relief, and that plaintiff cannot as well maintain such suit as the defendant. *Webb v. Donaldson*, 60 Mo. 396; *Burt*

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*v. Warren*, 30 Mo. App. 335. When the opposite party can only claim title through the record, and a defect appears upon the face of such record, there is no cloud on the title, such as will call for the exercise of the equitable powers of the court. *Clark v. Ins. Co.*, 52 Mo. 272.

*C. P. & J. D. Johnson* for respondents.

The judgment of the lower court was correct, because it appears from the pleadings and the evidence that the respondents were in possession of the premises in question, claiming an estate of freehold therein; and that the appellant claims title to the same, but does not, by answer, show cause why he should not be required to bring an action and try such title. Revised Statutes, secs. 2092, 2093; *Bredell v. Alexander*, 8 Mo. App. 117; *Burt v. Warren*, 30 Mo. App. 335; *Benoist v. Murrin*, 47 Mo. 559; *Von Phul v. Penn*, 31 Mo. 333; *Murphy v. DeFrance*, 23 Mo. 341; *DeWare v. Wyatt*, 50 Mo. 236; *Fontaine v. Hudson*, 93 Mo. 62; *Babe v. Phelps*, 65 Mo. 27; *Clark v. Ins. Co.*, 52 Mo. 273; *Mason v. Black*, 87 Mo. 344; *Beedle v. Mead*, 81 Mo. 297; *Cole v. Skrainka*, 37 Mo. App. 446; *Rutherford v. Ullman*, 42 Mo. 216.

ROMBAUER, P. J.—This is a proceeding under section 2092 of the Revised Statutes to compel the defendants to show why they should not be compelled to bring an action to try the title to a lot on the southwest corner of Ninth and Chestnut streets in the city of St. Louis. The petition contains the statutory averments of possession in the plaintiff under claim of a freehold title, and an adverse claim made by the defendants. The action was instituted against five defendants but was dismissed against two, and a default

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was taken against two who did not answer. Frederick Von Phul is the only defendant who answered. His answer denied that the plaintiffs were in possession under a claim of freehold title, and averred that the title to the land was held by the plaintiff H. V. P. Cooke as trustee for the devisees of Henry Von Phul, of whom the defendant Frederick was one. The court upon the hearing made an order debarring the two defaulting defendants, and ordering that the answering defendant bring an action to try the title within a specified time, or else be debarred from further claim. From this order the defendant Frederick alone appeals, assigning for error that the order is not warranted by the evidence.

Section 2093 of the Revised Statutes of 1889 provides: "If the defendant shall appear and disclaim all right and title adverse to the petitioner, he shall recover his costs; *if he shall claim title, he shall by answer show cause why he should not be required to bring an action and try such title*, and the court shall make such judgment or order respecting the bringing and prosecuting of such action as may seem equitable and just." As in the present instance the defendant does claim title, the only issue before the court was whether he had by his answer and evidence shown sufficient cause why he should not be required to bring an action to try it.

Touching the common source of the title under which the plaintiffs and defendants claim, there is no controversy. Both parties claim under Henry Von Phul. The plaintiffs gave evidence showing a conveyance of the lot in question by Henry Von Phul to certain trustees with power to convey; a conveyance by such trustees in 1872 to Maria Sophia Von Phul; a conveyance by the latter in 1880 to William Cooke; and a deed from William Cooke in 1883 to the plaintiffs'

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trustee; also that H. V. P. Cooke, one of the plaintiffs, was the trustee of his coplaintiffs at the present time. The evidence concedes that the plaintiffs are in possession under a chain of conveyances from Henry Von Phul, the common source of title, which conveyances are regular upon their face and purport to vest in the plaintiffs a fee simple estate in the property.

For the purpose of showing a claim on the part of the defendant, the plaintiffs gave in evidence the will of Henry Von Phul, who died in 1874, making certain specific devises to his children and among them to his son, Frederick, and giving the residue of his estate to all of his children. They also gave in evidence a written declaration of trust made by William Cooke in 1880 while he held the legal title to the property, to the effect that he held the property in trust for all the devisees of Henry Von Phul. The will of Henry Von Phul was not probated until 1892, and the declaration of trust was not recorded until 1892. There was no substantial evidence that the plaintiffs were aware of this declaration of trust at the time when they acquired the property.

Under this evidence we must hold that the court did not err in making an order upon the defendant. The evidence clearly shows that the plaintiffs are in possession of the property claiming the fee, and that the defendant does claim an adverse and *immediate interest in the property, which is capable of being tested at once by appropriate proceedings in the courts*, and which is as complete now as it ever will be. We consider that to be the test entitling the plaintiff to relief by this statutory proceeding. The form of action in which such title or claim of adverse interest is to be asserted is immaterial. *Benoist v. Murrin*, 47 Mo. 537, 539; *Bredell v. Alexander*, 8 Mo. App. 117. The plaintiffs under the evidence presented have a complete record title, and are not,

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therefore, under the decisions in this state, in a position to maintain an action to remove a cloud, but the defendant is, because whatever right or title he has arises from facts *dehors* the record evidence. *Mason v. Black*, 87 Mo. 329; *Fontaine v. Hudson*, 93 Mo. 62. As the defendant does by his answer assert an adverse claim to the property in himself, and fails to show good cause why he should not be required to bring an action to try it, the judgment of the court requiring him to do so was proper.

All the judges concurring, the judgment is affirmed.

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JOHN MOORE, Respondent, v. ST. LOUIS WIRE MILL COMPANY, Appellant.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Master and Servant:** ACCEPTANCE OF RISKS BY LATTER. A servant assumes all risks arising from defective appliances of which he knew, or which were so obvious as not to escape the observation of an ordinarily prudent person.

2. ———: ———: LAW AND FACT. Whether the risk is thus obvious is a question of fact, when different conclusions in regard thereto can reasonably be drawn from the evidence.

3. ———: ———: INSTRUCTIONS. An instruction authorizing a recovery by a servant against his master for injury from a defect in the appliances furnished by the latter, is fatally erroneous, if it does not require a finding that the defect was the cause of the injury.

*Appeal from the St. Louis City Circuit Court.*—HON. JACOB KLEIN, Judge.

REVERSED AND REMANDED.

*P. Taylor Bryan* for appellant.

(1) The instruction given by the court at plaintiff's request, which attempts to define the risks

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assumed by the plaintiff, is erroneous. It excludes from the risk of employment all risks which arise from the defects of appliances or places in which plaintiff was required to work, even though they were patent defects, and such as were known, or might, by the exercise of ordinary care, have been known to plaintiff. This is erroneous. Cooley on Torts [2 Ed.], 651, and cases cited; *Flynn v. The Union Bridge Co.*, 42 Mo. App. 529; dissenting opinion of ROMBAUER, P. J., in *Fugler v. Bothe*, 43 Mo. App. 44–69, adopted as the opinion of the supreme court; *Fugler v. Bothe*, 22 S. W. Rep. 1113; *Watson v. Coal Co.*, 52 Mo. App. 366; *Aldridge v. Furnace Co.*, 78 Mo. 539; *Hulett v. Railroad*, 67 Mo. 239; Wood on Master & Servant [2 Ed.], sec. 351, p. 724; *Sullivan v. India Mfg. Co.*, 113 Mass. 398. (2) The last instruction given for plaintiff is erroneous, in that it does not require the jury to find that the alleged absence of the guard or ledge, referred to in the instruction, was the cause of the injury to the plaintiff. *Flynn v. Union Bridge Co.*, 42 Mo. App. 529; *Breen v. Cooperage Co.*, 50 Mo. App. 203; *Spiva v. Osage, etc. Co.*, 88 Mo. 68; *Stone v. Hunt*, 94 Mo. 475.

*John J. O'Connor* for respondent.

Plaintiff's last instruction should be read in conjunction with all the other instructions given in the case, and when so read there is no substantial error. When instructions, read together, are not misleading and declare the law sufficiently favorably for the appellant he cannot complain. *Ridenhour v. Railroad*, 102 Mo. 270; *Haniford v. City of Kansas*, 103 Mo. 172; *Bergman v. Railroad*, 104 Mo. 77.

BIGGS, J.—This action for personal injuries originated before a justice of the peace. The plaintiff

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alleged in his petition that he was employed as a laborer in the defendant's mill, and that, while he was engaged in the work assigned to him, he fell into a vat of hot lime; that the accident occurred by reason of the negligence of defendant in failing to provide plaintiff with a reasonably safe platform on which to work, and in negligently leaving the vat open or unguarded close to where plaintiff was required to work. On a trial in the circuit court there was a judgment for $250, from which judgment the defendant has appealed.

The circuit court refused to nonsuit the plaintiff. This is assigned for error.

The plaintiff's case rests wholly on his own testimony. He testified, in substance, that he received his injuries on the second day after his employment inside of the mill; that he was engaged in carting loads of wire from the place where hot lime was poured over the wire to what were called the drying rooms; that the trucks which were loaded with wire were placed on a gangway or bridge constructed between two vats, which were constantly filled with boiling lime; that the vats were several feet long and one foot wide, and that the gangway was six or seven feet wide with a track in the center, running lengthwise, upon which the loaded trucks ran; that along the sides of this gangway next to the vats there were wooden guards two or three inches high, which were reasonably sufficient to keep persons from slipping into the vats; that there had previously been a similar guard on the end of the vat into which he (plaintiff) fell, but that a portion of it had been broken off; that it had the appearance of an old break, for the reason that lime and dirt had accumulated at the place where the guard had been broken; that he had no knowledge of the defective condition of the guard until after he received his injuries; that in

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moving a truck load of wire it became necessary, when he reached the end of the vat, for him to go to the side of the truck to keep the load from upsetting; that he placed his shoulder against the load, and in bracing himself his foothold gave way, and that by reason of the break in the guard his foot slipped into the vat of boiling lime.

It is undoubtedly the law that the master must furnish suitable and reasonably safe appliances for the accomplishment of the work assigned to the servant. (*Siela v. Railroad*, 82 Mo. 430; *Covey v. Railroad*, 86 Mo. 635; *Hickman v. Railroad*, 22 Mo. App. 345.) And it is also the law that the master must make the place where the servant is required to work reasonably safe. (*Reichla v. Gruensfelder*, 52 Mo. App. 43; *Dayharsh v. Railroad*, 103 Mo. 570; *Indermaur v. Dames*, L. R. 1 C. P. 274.) But the servant may dispense with these obligations which the law imposes on the master. As was said by the supreme court of Massachusetts: "When he (the servant) assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected." *Sullivan v. India Mfg. Co.*, 113 Mass. 396.

So the courts decline to hold the master liable, when the defects in machinery are perfectly obvious to anyone, and the servant has had the time and opportunity to consider and appreciate the extent of the risk.

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*Keegan v. Kavanaugh*, 62 Mo. 230; *Cummings v. Collins*, 61 Mo. 520; *McDermott v. Railroad*, 87 Mo. 287; *Reichla v. Gruensfelder*, *supra*.

The doctrine of the foregoing cases rests on the legal presumption that the servant is at liberty to engage in the work or not, as he sees proper; and, having voluntarily elected to enter the employment, he will be presumed to have contracted in reference to obvious conditions. This presumption, as a practical and every day question, is a mere fiction, for the reason that a great majority of laborers have no choice in the matter. Courts, however, ought to act on the legal presumption; for to ignore it would produce confusion and uncertainty in the administration of the law.

In the case of *Fugler v. Bothe*, 43 Mo. App. 44, a majority of this court erroneously supposed that the supreme court had broken away from this rule, and had imported into the jurisprudence of this state the law of many other jurisdictions, to the effect that the servant will not be considered as having assumed the increased risk arising from obvious defects in machinery or appliance, unless the danger be immediate or threatening. Judge ROMBAUER held to a contrary view, and so expressed himself in a dissenting opinion. The case was certified to the supreme court, and the views of the dissenting judge were adopted by that court. We are, therefore, justified in the belief that we will hear nothing more of the "*immediate and threatening danger doctrine.*"

Making application of the law to the facts as testified to by the plaintiff, we are not prepared to say that the inference is not a fair one, that the plaintiff did not see the defect in the guard. The plaintiff said that only a small portion of the guard was broken off, and that at that particular place lime and dirt had accumulated to a considerable extent, thus laying the

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foundation for the further inference, necessary to the plaintiff's recovery, that the break was not of recent date, and that the defendant knew, or ought to have known, of it. It must be borne in mind that the guard extended only two or three inches above the surface of the floor, making it possible for the break in the guard to be concealed by lime or dirt. Whether, under the physical facts as established by the plaintiff's evidence, the alleged break in the guard would likely escape the attention of an ordinarily observant person, is a question about which reasonable minds might differ. Therefore, the question was one of fact for the jury, and not of law for the court. This assignment will be overruled.

The defendant complains of the plaintiff's second instruction, which reads: "The court instructs the jury that, while the plaintiff is bound to accept the risks incident to the doing of his work when the appliances and instruments furnished to him with which to do said work are reasonably safe, and such as are usually used under similar circumstances for the doing of such work, this does not mean that he is bound to accept *risks or damages (dangers) which spring from any defects in the appliances or instruments with which he was required by defendant to do said work.* And the jury are further instructed that for the purpose of this action they shall consider the floor, as well as the rail or guard about the top of the vat mentioned in evidence, and into which plaintiff slipped, as part of the appliances furnished by defendant to plaintiff with which to do his work at the time he fell and slipped into said vat, if they find that he did so fall and slip."

As we have attempted to show, the servant assumes all risks arising from defective appliances of which he knew, or which were so obvious as not to escape the

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observation of an ordinarily prudent person. It is evident that the instruction was drawn upon an entirely different theory. That it was prejudicial cannot be questioned.

Plaintiff's third instruction is likewise faulty The jury was not required by it to find that the plaintiff did not know of the defect in the guard, or that an ordinarily observant man would not have discovered it. Nor was the jury required to find that the *defect was the cause of the accident*, which, in itself, rendered the instruction fatally defective, as it was one which covered the entire case. *Flynn v. Bridge Co.*, 42 Mo. App. 536.

For errors in the instructions, the judgment will be reversed and the cause remanded. All the judges concur.

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MICHAEL LEE, Respondent, v. DENNIS CLIFFORD, Appellant.

St. Louis Court of Appeals, December 19, 1893.

**The Evidence** in this cause is considered, and *held* sufficient to warrant the verdict.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*E. J. O'Brien* for appellant.

*Seneca N. Taylor* and *Erd & Powers* for respondent.

BOND, J.—This suit was begun before a justice of the peace for breach of a contract to do certain lathing and plastering on the houses of defendant.



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The statement of the cause of action was, that plaintiff submitted, at defendant's request, a bid for the work in question for the sum of $1,079, which bid was accepted by defendant; "that, within a reasonable time thereafter, plaintiff delivered at said houses the box in which to run off the lime, and made all preparations to proceed with the work * * * pursuant to the contract," but that defendant refused to allow him (plaintiff) to proceed with the work, wherefore he prayed for damages for $215.80.

Upon appeal to the circuit court, there was a trial and judgment in favor of the plaintiff, from which the defendant has appealed to this court, and assigns for error: *First.* That under all the evidence it was a condition precedent to the right of the plaintiff to perform his contract, that the houses *should be ready* for the work therein provided for. *Second.* That there was no evidence that respondent ever offered to do the work under his contract *after the houses were ready therefor.*

After a careful examination of the facts in this record, our conclusion is that there was evidence tending to show that the contract sued on was accepted by defendant without any express condition attached to such acceptance, except that *appellant wanted the work done without delay.* That there *was* an implied condition that the work was only to be done when the houses were in a suitable state for its performance, *results from the nature of the contract.*

This condition, we think, had happened on the day when plaintiff took his wagon and box to the houses for the purposes of doing the work. For the evidence is that he had, before this, examined the progress of the buildings, and had ascertained that they were about ready for lathing and plastering. And there was also evidence tending to show that on this

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very day they began to run lime in the buildings. The evidence also tended to show that at this time appellant *positively refused* to allow respondent to do the work on the buildings in question, and thereby prevented respondent's performance of his contract. It is apparent, therefore, that the foregoing assignments of error are not well taken.

All the instructions requested by appellant in this case, except the demurrer to the evidence, were given, and no complaint is made as to the instruction given for respondent.

There was evidence, as we have shown, supporting the allegations contained in the statement of respondent's cause of action. There was a finding in respondent's favor by the jury, which we cannot, of course, disturb on the ground merely of the weight of the evidence.

The result is that this judgment must be affirmed. All concur.

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JOHN HANDLEY *et al.*, Appellants, v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Respondent. 55 499 / 83 588

St. Louis Court of Appeals, December 19, 1893.

1. **Pleading:** DENIAL OF CONTRACT IN WRITING: MANNER OF INVOKING STATUTORY RULE. The statutory rule, that the defendant admits the execution of a contract in writing, upon which the action is founded, by failing to deny it under oath when he is charged therewith, cannot be invoked for the first time in this court; to be available it must be urged in the trial court as ground of objection to the introduction of evidence controverting the execution of the contract.

2. **Common Carriers:** SUFFICIENCY OF EVIDENCE. The evidence in this cause is considered, and it is *held* sufficient to show authority upon the part of a local agent of a common carrier to make a contract for the through shipment of stock beyond the carrier's line. The evidence is also *held* insufficient to conclusively establish an abrogation of that contract by the delivery of the stock by the carrier to the shipper at the terminus of the carrier's line.

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*Appeal from the St. Louis City Circuit Court.*—Hon. Daniel Dillon, Judge.

Reversed and remanded.

*Henry B. Davis* for appellant.

(1) The evidence that the local agents at McPherson were in the habit of issuing similar bills of lading and that they were recognized and carried out by the respondent is sufficient evidence of the authority of the local agent in this case. *White v. Railroad*, 19 Mo. App. 400; *Turner v. Railroad*, 20 Mo. App. 632; *Brooks v. Jameson*, 56 Mo. 505; *Sommerville v. Railroad*, 62 Mo. 399. The receiving carrier is liable for losses occurring beyond the terminus of its line when it has made a contract to transport the goods beyond such terminus. *Orr v. Railroad*, 21 Mo. App. 333; *Craycroft v. Railroad*, 18 Mo. App. 487.

*M. A. Low* and *W. F. Evans* for respondent.

Mr. G. W. Ecker, who signed the contract of shipment at McPherson as the agent of respondent, was merely the local agent at that point, and had no authority to execute the contract in question for the shipment of stock to a point not on the respondent's railway, and had no authority to undertake, on behalf of the respondent, the transportation of freight beyond its own line. *Grover, etc. Co. v. Railroad*, 70 Mo. 672; *Orr v. Railroad*, 21 Mo. App. 333; *Turner v. Railroad*, 20 Mo. App. 632. (2) The undisputed evidence shows that the stock in question was transported from Kansas City to St. Louis by the Missouri Pacific Railway Company in pursuance of the contract made by appellant, J. H. Handley, with that company at Kansas City, and that the injuries to the stock were received

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while on the line of that company and in its possession. The respondent should not be held to answer for the negligence of the Missouri Pacific Railway Company.

Bond, J.—This is an action brought for breach of a contract for the shipment of stock from McPherson, Kansas, to St. Louis, Missouri.

The contract sued on was executed by one of the plaintiffs, Handley, and also by the defendant railroad company by its agent, G. W. Ecker, and provided for the transportation of one car load of horses, subject to certain provisions inserted therein, from the town of McPherson, Kansas, to the City of St. Louis, Missouri. Under the terms of said agreement free transportation was accorded to one person for the purpose of accompanying the stock, and giving attention and protection to them while in transit.

The answer of the defendant was: *First*, a general denial; *secondly*, an averment that it was a common carrier between McPherson, Kansas, and Kansas City, Missouri, at which latter point its line terminated; that it delivered thereat the car load of horses and mules to the plaintiff, John Handley, in a good and and sound condition; that said plaintiff, Handley, after the delivery to him of the stock at Kansas City, as aforesaid, made a contract for their transportation with the Missouri Pacific Railway Company from Kansas City to St. Louis, Missouri, under and by which they were carried between those two points, with which contract the defendant has no connection, and whereto it was neither directly nor indirectly a party; *thirdly*, a denial that it ever entered into a contract for the shipment of the carload of horses from McPherson, Kansas, to St. Louis Missouri, a denial that it was a common carrier between those points or between Kansas City and St. Louis, Missouri.

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The evidence showed that about the twenty-first day of June, 1890, a written contract was executed between plaintiff Handley and the defendant, whose signature was attached by its agent, G. W. Ecker, which contract obligated the plaintiff to ship, and the said defendant to haul, a car load of horses and mules from McPherson, Kansas, to St. Louis, Missouri, under other limitations and restrictions as to care, attention, liability, etc., set forth in said contract.

The evidence tended to show that in pursuance of this contract, plaintiff, after some delay, secured a "street stable car," number 825, which he loaded with his stock and for which he paid $7.30, extra price, which extra amount was presented in the bill for the freight which he paid at St. Louis.

The evidence tended to show that, after the arrival of this car containing the stock of the plaintiff at Kansas City, they were taken therefrom for the purpose of being fed; that thereafter in the evening, when plaintiff Handley had started his horses to the "chutes" to be loaded for St. Louis, he was met by an agent of the Missouri Pacific road who told him that the car, in which his stock had come to Kansas City, had been taken away, and that there was no car there to put his stock in; that thereupon said Handley demanded a street stable car, so that he could separate his stock and secure their safety; that he was told that he would then be left at Kansas City; that he replied that he "was three days late now getting to St. Louis; that will put me off again; a big feed bill, and I don't know anything to do;" that thereupon the Missouri Pacific agent went off, and after a while an engine was sent with an old car ankle deep in mud and manure, which had been lying on the side tracks, for the reception of plaintiff's horses; that he objected to the use of this car; that the men around the car carried about two

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buckets full of sand into it, drove the plaintiff's horses into the car, and pulled the car up into the yard; that the plaintiff then walked up into the yard and met the yardmaster, and complained of the injustice that was being done him; that, soon after the train had started on its journey to St. Louis, plaintiff's horses were thrown down in the mud, tangled up, and several of them injured; and that, when they arrived at St. Louis, several of them were down and many of them in a badly damaged condition.

The evidence tended to show that, after plaintiff's horses had been placed upon the cars of the Missouri Pacific railway at Kansas City, he signed a contract handed to him by the agents of that corporation, covering their transportation to St. Louis and covering free transportation for himself; and that under that contract the shipment came from Kansas City to St. Louis, where it was delivered in a badly damaged condition.

The evidence tended to show that plaintiff had been shipping eight or ten years; that he had shipped some twenty-five or thirty loads of horses over the road to St. Louis; that it was proper to take such shipments out of the cars at Kansas City and feed and water them, and then take the evening train for St. Louis; that this would enable the shipment to reach St. Louis on the same time as if, when it got to Kansas City, it had not been unloaded but put on a local train and forwarded to St. Louis.

The evidence tended to show that the special street stable car, hired by plaintiff at McPherson, Kansas, was placed in the possession of the Missouri Pacific road by the defendant railroad when it arrived at Kansas City; that, when the stock arrived at St. Louis, they were damaged to the extent sued for.

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The evidence was that the defendant railroad owned no line between Kansas City, Missouri, and St. Louis, Missouri, and that G. W. Ecker, who signed its name to the stock shipment contract sued on, was its local agent at McPherson, Kansas, where he did their business and solicited stock, and was in control of the agency at that point, which was a place of considerable shipment, averaging five loads of stock a day; that the general offices of the defendant railroad are at Topeka, Kansas.

The evidence tended to show that the particular shipping contract sued on was the first one that Mr. Ecker, on behalf of the defendant railroad company, had ever executed with the plaintiff Handley, although he had signed and executed a number of such contracts since that time, and although the plaintiff had, under contracts of a similar form, signed by agents who preceded Mr. Ecker, made shipments to St. Louis of other loads of stock for the last three or four years. The total freight charges, including the rent of the street stable car and amounting to some $70, were paid at St. Louis to the agent of the Missouri Pacific Railway Company.

At the close of the case the defendant prayed the court to give an instruction in the nature of a demurrer to the evidence, which instruction, being held under advisement, was given on November 19, 1892, and final judgment rendered in favor of the defendant. Plaintiff duly excepted to this ruling of the court, and, after the overruling of his motion for a new trial, took an appeal to this court.

The one question arising on this appeal is whether or not, under the pleadings and evidence or the legitimate inferences arising therefrom, the plaintiff was entitled to have the issues herein submitted to a jury.

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The petition in this case being founded on a written instrument charged to have been *executed* by the defendant, and there being no answer denying its execution verified by affidavit, the law is that its execution should have been adjudged confessed. Revised Statutes, 1889, sec. 2186; *Rothschild v. Frensdorf*, 21 Mo. App. 321; *Smith, etc., Co. v. Rembaugh* 21 Mo. App. 390.

It has, however, been held by this court that to avail himself of this statutory rule, the party alleging the written contract must object to the testimony tending to impeach its execution in the trial court, on the ground that the answer or other pleading denying its execution is not verified by affidavit. It was further held that such objection could not be interposed for the first time in an appellate court. *Beck & Pauli Lithograph Co. v. Obert*, 54 Mo. App. 240.

There was evidence to the effect that the plaintiff had made a number of contracts for through shipment to St. Louis with the local agent at McPherson. While the evidence is not quite clear that any of such contracts were made before the contract in controversy, we are not prepared to say that the evidence had no tendency to show that fact.

We must, therefore, hold that the issue as to the authority of the local agent to make the contract in question should have been submitted to the jury.

The only question remaining is whether or not the contract, made by plaintiff with the Missouri Pacific Railway Company at Kansas City for the shipment of his stock thence to St. Louis, operated as an abrogation of the contract entered into by him with defendant at McPherson for their shipment from that point to St. Louis.

Under the facts and circumstances in evidence in this case, there are but two views which can be taken

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of the conduct of defendant in delivering the shipment made by plaintiff at Kansas City.

*First*, that defendant thereby delivered the stock to plaintiff, declining on its part to transport it any further.

*Second*, that defendant delivered the shipment in question to the Missouri Pacific Railway Company, in order to fulfill its through contract with plaintiff by means of a connecting carrier. In other words, when the stock shipment in question reached Kansas City, defendant then committed a breach of its contract, or continued the performance of its contract by a connecting carrier.

Whichever of these two views may be taken, we think, under the record, the case should have been submitted to a jury.

If the act of the defendant in stopping the special street stable car, numbered 825, which was designated in its contract of shipment at Kansas City, amounted to a breach of that contract, then the plaintiff is not precluded from recovering the natural and proximate damages occasioned to him by such breach, because he *thereafter* entered into another contract with another carrier for the transportation of his stock to the point of their original destination.

On the other hand, if the act of defendant in putting the special car containing plaintiff's shipment in the possession of a connecting carrier at Kansas City, was for the fulfillment of its contract for through shipment, then it is equally plain, under the facts in this record, that this case was one for the jury. For we do not think that the reception by the plaintiff of the contract tendered to him by the Missouri Pacific road, *after his stock had been received by, and was in the possession of, that company*, was, as a matter of law, an abandonment by the plaintiff of his rights under the prior

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contract. His strenuous objections to the deprivation of the special stable car secured to him, and his protest against the car in which his stock were placed by the Missouri Pacific road, and other circumstances, all indicate that the contract between himself and the Missouri Pacific road was mainly to afford himself free transportation as the attendant of his stock, or, at any rate, that it was signed by him with no intention whatever of thereby releasing the defendant from its obligations to him for through transportation of his stock on the special street stable car which they had stipulated to "haul," and for which an extra charge was exacted; and the question of that intention ought to have been submitted to the jury.

Even if the contract in suit had provided for transshipment to St. Louis without stipulating for a special car, the defendant would still be liable for the negligence of the carrier who performed that portion of the transportation, provided for in defendant's contract, between Kansas City and St. Louis, unless there was a new and substituted agreement superseding the original contract. Our conclusion is that this case ought to have been submitted to the triers of the fact under appropriate instructions. For the error of the trial court in sustaining a demurrer to all the evidence, its judgment is reversed and the cause remanded. All concur.

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## A. O. Terry *et al.*, Respondents, v. Robert C. Greer, Appellant.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Contracts:** INDEPENDENT AGREEMENTS. *Held, arguendo,* that two promises are not necessarily dependent because concurrent.

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2. **New Trial:** NEWLY DISCOVERED EVIDENCE. *Held, arguendo,* that a new trial on the ground of newly discovered evidence is not warranted, when such evidence ought not to change the result upon a retrial.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

AFFIRMED.

*David Murphy* for appellant.

*Edmond A. B. Garesche* for respondents.

ROMBAUER, P. J.—The plaintiffs recovered a judgment against the defendant for one-half of the commissions which the latter received from the owners for selling certain lands in the city of St. Louis. The defendant now assigns for error that this judgment is not supported by substantial evidence, and is opposed to the plaintiffs' admission upon the trial; also that the court erred in modifying an instruction asked by the defendant.

The plaintiffs' petition charges that the defendant agreed to and with plaintiffs that, if they could secure for him as the agent of the owners a purchaser for the land in question at $43,000, he would pay to them for their services in so doing one-half of the commissions received by him from the owners. The defendant's answer is a general denial. The plaintiffs gave evidence tending to show that they bought the land themselves for $43,000, although they claimed by their evidence that the purchase was in the interest of a syndicate. Whether they bought it themselves or in the interest of a syndicate is wholly immaterial, since the defendant's liability, if it existed at all, depended on the fact that the plaintiffs secured a purchaser for the lands at the sum mentioned, and that the defendant

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thereby earned his commissions. Touching the averments that the land was sold for $43,000 by the plaintiffs' exertions, and that the defendant thereupon collected from the owners his full commissions, and that he never paid any part of such commissions to the plaintiffs, there is no controversy whatever. All the evidence concedes the truth of these averments.

The defendant was called as witness on his own behalf. He neither admitted nor denied that he had made a contract with the plaintiffs to pay them one-half of his commissions. He did, however, state that, while on his way to Belleville with one of the plaintiffs to see the owners (which was at a time subsequent to the agreement about commissions testified to by the plaintiffs), he, the defendant, inquired whether he could have an interest in the purchase, and that the plaintiff told him he would like to have him (the defendant) come in, and that thereafter it was arranged that the defendant should have a half interest in the venture. The defendant, however, admitted that he never made any demand for a conveyance of such half interest to himself, and that he never tendered any money to the plaintiffs at any time, and that in fact he did not know what payments were made by the plaintiffs to the owners, nor when such payments were made.

The defendant's first assignment of error is claimed to find support in the following testimony of one of the plaintiffs, when called in rebuttal.

"Going to Belleville he (the defendant) said he would like to go in first rate, but he had so much on his hands, so much vacant ground and other property to attend to, he did not see how it was possible to go in.

"*Q.* Did he ever tender you at any time any money on this? *A.* No, sir.

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"*Q*. Did he at any time ever demand of you a conveyance of any interest in this property? *A*. Well, I don't know as he ever demanded any conveyance, but, when I asked him about the commissions, he said, 'Ain't I going to get an interest in that?' I said 'no.' He said 'why;' and I said, 'because you did not put up; you didn't go in, you said you didn't want to go in, and I took other partners in.'"

It needs no argument to show that this evidence contains no admission, to the effect that the defendant had not at some prior time agreed to divide commissions with the plaintiffs, or that the plaintiffs ever agreed with him to give him an interest in the purchase, or that his interest in the purchase superseded the agreement as to commissions. Hence the error is not well assigned.

The second assignment of error is based upon the following modification by the court of one of defendant's instructions, the modification consisting in adding to the instruction the words placed in italics:

"The court instructs the jury that, if they believe and find from the evidence in this case that plaintiff and defendant agreed that plaintiff should buy the Waugh property, and then convey or transfer one-half, or other interest therein, to defendant, and that all expenses should be borne equally, and all profits and commissions equally divided, *and that this was all one agreement*, and that there was no agreement between plaintiffs and defendant having reference solely to a division of commissions for the sale of the Waugh property, then their verdict should be for defendant."

We are very clear that there was no error in refusing the instruction as asked by the defendant, but we are not quite so clear that there was no error in giving it as modified. That error, however, was in favor of the defendant, in this, that the instruction

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assumes, as a matter of law, that the two promises mentioned therein, if *concurrent*, were necessarily *dependent*, and that the plaintiffs could not enforce the defendant's promise without first complying with their own. Such is not the law in this class of cases. *Burris v. Shrewsbury Park Land and Improvement Co.*, *ante*, page 381, and cases there cited. Moreover, there was no substantial evidence in the case that the two promises were concurrent; hence the court, in submitting to the jury "that this was all one agreement," went further in defendant's favor than the evidence warranted. It is self-evident that the fact that plaintiff and defendant made one agreement at one time, is in no way disproved by evidence that they made another agreement relating to a different subject at some other time.

No error is formally assigned touching the action of the trial court in not granting a new trial on the ground of newly discovered evidence. We deem it sufficient to say on that subject that the affidavits show that such evidence relates exclusively to an admission to be implied from the silence of one of the plaintiffs upon an occasion when he was under no obligation to speak. Such evidence is of the weakest character, and, hence, not such as ought to change the result upon a retrial. It would have been no ground for awarding it, even if the error had been formally assigned.

All the judges concurring, the judgment is affirmed.

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CLIFTON R. SCUDDER, Respondent, v. JOHN C. ATWOOD, Appellant.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Illegal Trusts:** ENFORCEMENT IN EQUITY. A court of equity will not lend its aid to the enforcement of an illegal trust, and accordingly will not, at the suit of a debtor who has conveyed his property to hinder or defraud his creditors, compel a reconveyance to him.

2. ———: PLEADING. Under the general issue evidence may be received, which tends to show a cause of action never existed, or that it was void *ab initio*. Accordingly, when a petition alleges a lawful trust in favor of the plaintiff and seeks to enforce it in equity, it may be shown under a general denial that the trust was made for fraudulent purposes.

*Appeal from St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

REVERSED.

*Geo. W. Taussig* for appellant.

(1) The testimony of plaintiff discloses a plan to conceal his property from his creditors by placing it in the name of defendant, and the successful execution of the plan; that the plaintiff by such fraudulent concealment of his property from March, 1888, to April, 1892, completely exhausted his creditor, so that the latter was compelled to take a small per cent. of the debt due from plaintiff; that now the plaintiff "has gotten rid of his creditor," and seeks the aid of a court of equity to recover back the property. "The door of a court of equity is always shut against such claimants." 1 Pomeroy's Equity Jurisprudence, sec. 397, *et seq.*; *Trimble v. Doty*, 16 Ohio St. 118; *Nellis v. Clark*, 20 Wend. 24;

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*St. John v. Benedict*, 6 Johns. Ch. 117; *Perkins v. Savage*, 15 Wend. 412; *Garrett v. Kansas Coal Co.*, 111 Mo. 279; *Kitchen v. Greenebaum*, 61 Mo. 116; *Sumner v. Sumner*, 54 Mo. 340; *Holt v. Green*, 73 Penn. St. 198; *Steadman v. Hayes*, 80 Mo. 319. (2) The petition is based upon an express trust, "that defendant, upon plaintiff's request, and upon the understanding that defendant should never be called upon to pay for the same or any part thereof, and for the purpose of holding the same for the use and benefit of plaintiff, subscribed, and agreed to pay for, thirty-nine shares, * * * to be issued in defendant's name for the use and benefit of plaintiff, and in trust for him. The answer contains a general denial of these averments. Under the pleadings, the plaintiff was obliged to show such an express trust, and it was competent for defendant to show, under the general denial, that the alleged trust was void *ab initio*, and that no legal contract existed. *Hardwick v. Cox*, 50 Mo. App. 509; *Wilkerson v. Bowman*, 82 Mo. 672; *Greenway v. James*, 34 Mo. 328; *Chapman v. Currie*, 51 Mo. App. 40; *Tyler v. Larimore*, 19 Mo. App. 445; *Carter v. Shotwell*, 42 Mo. App. 663; *Thomas v. Ramsey*, 47 Mo. App. 84; *White v. Middlesworth*, 42 Mo. App. 368; *Sprague v. Rooney*, 104 Mo. 349; *Hoffman v. Parry*, 23 Mo. App. 20; *Corby v. Weddle*, 57 Mo. 452; *Eidson v. Hedges*, 38 Mo. App. 52.

*Walter B. Douglas* for respondent.

The appellant's contention, that he is not liable in this suit for the reason that he and respondent entered into a fraudulent combination to cheat respondent's creditor, is an affirmative defense, and, not having been pleaded, was not a matter in issue in the court below and will not be considered here. *Musser v. Adler*, 86



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Mo. 445; *St. Louis, etc. Ass'n v. Delano*, 37 Mo. App. 284; s. c., 108 Mo. 217; *Cummiskey v. Williams* 20 Mo. App. 606; *Moore v. Ringo*, 82 Mo. 468; *Reese v. Garth*, 36 Mo. App. 601; *Mize v. Glenn*, 38 Mo. App. 98; *Sybert v. Jones*, 19 Mo. 86; *Suit v. Woodhall*, 116 Mass. 547; *Foster v. Hall*, 12 Pick. 89.

BOND, J.—This is a proceeding in equity for the purpose of obtaining a decree or judgment, compelling the defendant to assign and deliver to the plaintiff a certain certificate, number 8, for two shares of stock in the St. Louis Electric Light & Power Co., and divesting all title in said two shares out of defendant and vesting the same in plaintiff.

The petition stated in substance that, at or immediately prior to the organization of said corporation, at plaintiff's request and upon the understanding that he, the said defendant, should never be called upon to pay the same or any part thereof, and for the purpose of holding the same for the use and benefit of plaintiff, the defendant subscribed for thirty-nine shares of the original capital of said company; that plaintiff was at said time insolvent, and, having paid to the company's first board of directors the subscription price of said stock, caused and directed the certificate for said thirty-nine shares to be issued in the name of defendant, and defendant's name to be entered upon the books of said company as the owner of said thirty-nine shares; that the certificate so issued to defendant included, among others, to-wit, number 8, for two shares, "*all of which was done in pursuance of said understanding that said defendant should not be called upon to pay for said stock, or any part thereof, and for the purpose of defendant's holding said thirty-nine shares in every part thereof for the benefit of plaintiff and in trust for him;*" that defendant has never paid any consideration for any of the

shares of stock so issued to him, but that the full subscription price therefor has been paid by plaintiff, and that the plaintiff has always been the actual owner of all of said shares of stock, though issued in the name of defendant. The petition then alleges an increase of the capital stock of the company on March 11, 1890, and another increase on May 2, 1892. It then admits that defendant has issued to plaintiff all the shares of stock originally issued to him, except the two shares evidenced by said certificate, number 8. It then alleges that since June 14, 1888, plaintiff has been entitled to have said certificate, number 8, for two shares transferred and delivered to him "*by reason of the trust established as aforesaid*;" that plaintiff then demanded of defendant to assign and deliver certificate, number 8, to plaintiff "*in fulfillment of said trust*, but that defendant refused to do so, as in equity and good sense he is bound to do by *reason of the trust aforesaid*." Wherefore the petition asks for the relief compelling the defendant to assign and deliver said certificate, and divesting title out of him.

The answer admits the insolvency of plaintiff, and avers that defendant was employed by plaintiff and one D. W. Guernsey, a co-incorporator of the plaintiff to act for them in the purchase of certain electrical appliances and machinery, which were among the assets of the assigned estate of the Guernsey Furniture Company, in which plaintiff and said Guernsey had been stockholders; that defendant purchased said property for the benefit of plaintiff and Guernsey at the assignee's sale for the sum of $3,000, which money was furnished by plaintiff and said Guernsey; that the title of the property so bought was taken in defendant's name, and was conveyed thereafter to the St. Louis Electric Light Company upon its incorporation as the basis of the capital stock of that corporation, to-wit,

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$8,000; that the only consideration received by the defendant for this conveyance was seventy-eight shares of the full paid stock of said corporation, among which were the certificates of stock set out in the petition; that defendant thereupon at once transferred to plaintiff thirty-seven shares, and to Guernsey's assignee's thirty-nine shares of the stock issued to him, in full discharge of all the claims against this defendant by reason of the premises.

The answer further avers that said certificate, number 8, for two shares was delivered to him for his services to said company, and to said Scudder, as his absolute property.

The reply of plaintiff was a general denial.

There was a judgment in the court below in accordance with the petition. The material facts shown on the trial were, to-wit, that the plaintiff and D. W. Guernsey were officers and stockholders in the Guernsey Furniture Company, which made an assignment for the benefit of its creditors in January, 1888; that among the assets thus assigned was an electrical plant, which the assignee was ordered to sell at public auction; that plaintiff and said Guernsey desired to purchase this asset; that at the time plaintiff and said Guernsey were indebted individually to one George W. Parker as joint makers on twenty-three notes for $450 each, dated December 15, 1886, and payable respectively from fourteen to thirty-six months after date; that, to enable them to make the purchase, respondent arranged with Mr. Cupples for a loan of $3,000, one-half for himself and one-half for Mr. Guernsey, respondent being responsible for the whole amount; that, at respondent's request, and with the money borrowed from Mr. Cupples, the electrical plant was purchased by appellant at a public sale of the assets of the assigned estate; that thereupon the corporation, now known as the St.

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Louis Electric Light and Power Company, was organized by subscription of seventy-eight shares made by appellant, and of one share each by respondent and Mr. Guernsey; that Guernsey was chosen as president; appellant as vice-president, and respondent as treasurer; that thereupon one share of stock each was issued to Scudder and Guernsey, and seventy-eight shares were issued to appellant, who at once transferred thirty-nine of them by the direction of Mr. Guernsey to Geo. D. Barnard, and indorsed thirty-seven of the remainder to Scudder, who at once transferred them as collateral security to Mr. Cupples. This transaction left in appellant's hands only certificate, number 8, for two shares of the stock in question, which he has retained ever since, and which is the subject-matter of the present suit.

Respondent states with reference to the retention of these two shares that he said to appellant: "John, all this stock will be out of my hands; I won't have any at all, as it will be in Mr. Cupples' hands for security. You had better keep this certificate for two shares to indemnify yourself as stockholder;" that nothing was said about payment of appellant for his services "more than I (respondent) asked him to hold the stock to be a director in the company, as it was necessary accord ing to law;" that the reason why the stock was not issued in his (Scudder's) name was that he was afraid Parker (an existing creditor) would get hold of it; that he, Scudder, told appellant that he "didn't want to take any chance of Parker jumping on it."

Matters remained in this plight until about April 25, 1892. During this interval the business of the corporation prospered, and its stock was twice increased. New shares representing the increment of its assets were issued to appellant in lieu of certificates formerly held by him (except for certificate number 8), and were

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by him indorsed and delivered to respondent, who thereupon indorsed all of them over to Cupples from whom respondent had borrowed a part of the money used by him in paying for a portion of the increase of the capital stock, the remainder of the increase having been paid for in profits of the business.

During this interval, to-wit, February 13, 1891, Parker, the creditor for $4,337, accepted fifty per cent. thereof as satisfaction of his claim therefor against Scudder and Guernsey from the latter. About fourteen months thereafter Scudder contributed to Guernsey one-half of what Guernsey had paid Parker. A short time after this Scudder wrote the following letter, and got the following reply:

"St. Louis Electric Light and Power Co.

"St. Louis, Mo., April 25, 1892.

"*Mr. J. C. Atwood*,

"Dear Sir.—As per notice mailed you, we will hold our annual meeting on Monday, May 2.

"As matters now stand, I suppose you will not put in an appearance on that day; if such is the case, I should like very much to have the stock which now stands in your name transferred. Please let me know as soon as possible your wishes in the matter and oblige,

Yours truly,

"C. R. Scudder."

To this, Atwood answered as follows:

"St. Louis, Mo., April, 28, 1892.

"*Mr. C. R. Scudder, Secretary and Treasurer St. Louis Electric Light and Power Co.*,

"Dear Sir:—Yours of the 25th inst. received. As to whether I attend the annual meeting on the 2nd prox. (of which I stand fully advised) or not, I judge it makes but little difference and will not prove at all detrimental to proceedings. If it is contemplated my absence and non-representation of my stockholding

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will inconvenience proceedings, I am ready to either attend or to send my proxy, to be voted only on the proposition to increase the capital and alter corporate name.

"Touching your intimation that my continuance as a stockholder is distasteful to yourself, and your suggestion as to transferring it, I offer you the option of purchasing my interest for $2,250. I judge that is a reasonable estimate of its value, inasmuch as the original capital of the company was $8,000 and was increased to $30,000, and is to be increased again one hundred and fifty per cent. out of the accumulated profits, augmented value of property, franchise, etc., and considering that the earning capacity of the business will be likely to continue as it has for the past few years, if not increase.

"If this proposition is not accepted and I do not dispose of the stock in the meantime to other parties, I shall expect, if there is a re-issue of stock on the capital being increased, to receive a number of shares of such new stock proportionate with my present holding to which I will be entitled, whereupon I will surrender my present certificate.

"Yours truly,

"J. C. Atwood."

With reference to the foregoing letters respondent said "he could not get the stock in his own name until he got the Parker matter out of his way," and further made answer as follows to the following question, to-wit: "And that is the reason you could not ask him to transfer it back sooner, for you couldn't get the stock in your name until you got the Parker matter out of the way?" *A.* I didn't want to do it until I had gotten the Parker matter out of the way." *Q.* "Because, if you had the stock transferred to you, he (Parker) would come down on you and collect his

just debt?" *A.* "That would be the danger; yes, sir." *Q.* "Don't you remember that you told Atwood, at the time of the original transaction for the purchase of this plant, that you didn't know when Parker might bother you, and you wanted to get it in his name until you got straightened up?" *A.* "Yes, sir; I said that, and that is the fact, too; that is what I did say."

There was a breach of friendship between respondent and appellant in February, 1892.

Appellant's testimony was that he was asked by respondent to buy in the electric plant which had been conveyed to the assignee of Guernsey Furniture Co., and join in an incorporation based on this plant as its capital stock; that they would give him enough stock to be an officer and director in the proposed corporation, and enable him to "perform the functions expected of him in the company;" that he attended the sale, bought in the property for $3,000, of which Guernsey and Scudder each furnished one-half, transferred the identical property to the corporation thereafter organized upon a paid up capital of $8,000; that thereupon all the stock, except one share each to Scudder and Guernsey, having been issued to appellant, he transferred thirty-nine of said shares by indorsement to Guernsey, and thirty-seven in the same manner to Scudder; that, as to the two remaining shares (certificate No. 8) Scudder said: "Here, take them; these are yours. I am sorry I cannot give you more, but you know my circumstances, and I would do it if I could." Appellant told him: "It was all right and to let the thing stand as it was;" that he was given to understand that they were given in consideration of services.

There are only two questions presented on this appeal: *First.* Whether or not respondent is entitled to a decree under the pleadings and evidence, vesting title in himself to certificate, number 8, for two shares

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of stock in execution and performance of the trust alleged in his petition. *Second.* Whether or not, if not equitably debarred from such relief, respondent is *under the evidence* entitled thereto?

Under the first inquiry the essential question is the scope of the evidence admissible under the general denial contained in the answer. Under our practice act the rule is that all defenses, which do not disprove the allegations necessary to the support of the plaintiff's case, must be affirmatively pleaded in the answer. An obvious corollary to this rule is that, under the general issue, evidence may be received which tends to show that the cause of action *never existed* or that it was void *ab initio*. *Greenway v. James*, 34 Mo. 326; *Sprague v. Rooney*, 104 Mo. 360; *Hardwick v. Cox*, 50 Mo. App. 513; *White v. Middlesworth*, 42 Mo. App. 373; *Wilkinson v. Farnham*, 82 Mo. 672; *Musser v. Adler*, 86 Mo. 445; *St. Louis, etc., Association v. Delano*, 108 Mo. 217.

In the case at bar respondent admitted on the witness stand that he had caused the two shares of stock to be put in appellant's name in order to screen them from respondent's creditor, Parker, and that, he "didn't want to get the stock in his (respondent's) name, until he had gotten the Parker matter out of the way," and that, to that end, he made no demand upon appellant for the transfer of the certificate for these two shares of stock until he had settled Parker's claim. There could not be fuller or more positive proof of the *character* of the trust assumed by appellant in taking the stock in his name and retaining it thereafter, than is afforded by this testimony of respondent. It is also apparent that the *trust* thus established in respondent's evidence is repugnant to, and disproves, the trust alleged and set forth in respondent's petition, and proves that no such trust as the latter ever existed, and that the one in fact created was illegal in its inception.

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It follows, therefore, according to the definition of the issues raised by the general denial, that it was competent thereunder in this case to adduce evidence of the real character of the fraudulent trust created by respondent, and assumed by appellant, in the issuance of the stock sued for in appellant's name. Such evidence, being receivable generally under the general denial contained in appellant's answer, was, for a stronger reason, admissible, since it appeared in the testimony of respondent and as a part of this case. *Hudson v. Wabash Railroad*, 101 Mo. 30. In the latter case the rule is laid down, that even strictly affirmative defenses need not be specially pleaded, if the evidence of the plaintiff disclosed a fact (contributory negligence) which absolutely defeats his right of action and disproves his own case. (Petition for negligent injury.)

That the unlawful trust, shown by the evidence in overthrow of the express trust alleged in the petition, is not one that can be enforced in a court of equity, is established beyond all controversy. *Nellis v. Clark*, 20 Wend. 24; Pomeroy on Equity Jurisprudence, section 401; Beach on Modern Equity Jurisprudence, section 78; *Kitchen v. Greenabaum*, 61 Mo. 110; *Taylor v. Von Schrader*, 107 Mo. 228; *Larimore v. Tyler*, 88 Mo. 66; *Sumner v. Summers*, 54 Mo. 340. As said by the supreme court of the United States in the recent case, quoting from Chancellor Walworth: "Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct." *Dent v. Ferguson*, 132 U. S. 66; *Bolt v. Rogers*, 3 Paige, 157.

Our conclusion is that the judgment of the lower court must be reversed. All concur.

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WILLIAM J. JONES, Appellant, v. ROSE M. JONES, Respondent.

**St. Louis Court of Appeals, December 19, 1893.**

**Divorce: DESERTION BY WIFE. If a husband sees fit to invite members of his family to live with him, his wife has no right to leave his home on that account.**

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED *(with directions)*.

*P. W. Fauntleroy* for appellant.

*Stone & Slevin* for respondent.

The question before the court is one merely of the sufficiency of the evidence to warrant the action of the trial court in dismissing the bill. In such cases the appellate court will defer greatly to the opinion of the trial court. The witnesses are there present; their credibility can be determined by their manner and demeanor. *Walker v. Owens,* 25 Mo. App. 587; *Mathias v. O'Neil,* 94 Mo. 520. A wife is guilty of no wrong, who leaves her husband because of torment offered from his relations living with him, and is not bound to return to him unless he assures her of protection from continuance of the wrong. *Spengler v. Spengler,* 38 Mo. App. 266.

BOND, J.—This an action for divorce, brought by the husband upon the statutory ground that the wife had absented herself "without any reasonable cause for the space of one year." Revised Statutes, 1889, section 4500.

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The answer was a general denial. There was a trial and judgment dismissing the petition, from which the plaintiff has appealed, and he assigns for error that under the evidence the court should have granted a divorce. There is no dispute that the respondent absented herself from the appellant for a longer period than one year. The only question, therefore, is whether or not such desertion was for a reasonable cause.

The evidence showed that the parties intermarried on June 18, 1890, and lived together in a house owned by the mother of the appellant, the three constituting the whole family, up to February 18, 1891, at which time the wife left and spent a month with her parents, after which she returned to the appellant and remained with him five weeks (April 25, 1891). Since then she had absented herself. The evidence is that the appellant earned about eighteen dollars per week, and that his mother with whom he lived had no means but the little house.

It is not denied that the appellant's mother did all the house cleaning, washing, ironing and cooking for the family, with some assistance from the respondent in ironing plain pieces and a little help in the cooking. The respondent admits that this state of affairs continued for about seven months after her marriage, during which she had an "easy time;" that for eight months after their marriage the respondent declined to accord appellant his martial rights, and that, in the middle of April, 1891, she told him "all intercourse with her was done forever," and left his home and took up her abode with her parents.

The evidence disclosed that the appellant requested his wife to return to him both on the occasion of her first and second departures; that at first she wrote him that she would do so, if he would provide her a

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separate house apart from his mother. He replied that he was unable to do so, and that it was her duty "to come home and behave herself."

After respondent finally left her husband she wrote him the following letter:

"St. Louis, August 2, 1891.

"Billy: I received your what I would call very saucy note, and I think it will about settle everything between us, that is, as far as I can look into the future. I am afraid we can never be friends again. I can never live under the same roof with your mother, for she has too violent a temper for me to trust myself with her. As long as your mother says that I am not good or honest or faithful and was so very dirty, I don't see what you would be doing with me out there. I don't see how your mother dare say I am not honest. Have I ever taken anything from you? She better be careful how she speaks about me, or she may have to pay dear for it. I will have no one call me dishonest. And as you are not man enough and too stingy to look after a wife, you had better stay with your mother, where you belong. So when you can act like a man and a husband, and get a home for me without your mother interfering with my affairs, I will go with you. One can easily see what kind of a man you are. I have now been away 4 months, and I have never received one nickel from you, not even so much as to pay my car fare when I have met you. *I have got a situation, and am going to work to earn my own money independent of you. I don't see why you are bothering yourself asking me to come home. I have heard that you have been consulting a lawyer, and I don't see what you are thinking about wanting me to come home after you have gone that far.* Why don't you finish the proceedings, and leave me where I am? You can blame your mother for all this trouble she has bought on us. She

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has belied me all through, and you have believed it all. Her own heart will tell her what she has done. I have never seen a woman with such a temper as she has got, but I will leave her to God, as he is the best judge. *Do not write any more letters to me, as it will only be a waste of time. So I suppose I may say good-bye forever; for we can never live together while your mother is there, unless something extraordinary occurs that will alter the affair, and until such times I intend to stay where I am. So I must close my letter. From your wife,* ROSE."

It is not denied in the record that appellant's home was comfortable and well supplied with necessary food, and in all respects suitable to his condition in life. Nor is any excuse given by respondent for leaving this home, except the complaint that her mother-in-law was a woman of ungovernable temper and had spoken to respondent about the way the windows were cleaned, and that she (appellant's mother) had words with a couple of the neighbors, because respondent spoke to them.

We think the action of the trial court in dismissing the appellant's petition is wholly unwarranted under the evidence adduced on the trial. Respondent left the home of her husband for the full statutory period, not for want of support, or any indignity inflicted by her husband, but in substance because his mother lived in the same house.

True, respondent gives as the reason for her refusal to live with her husband that his mother's temper was violent, ungovernable, etc. But when she is asked to specify instances of such manifestations of temper, she is compelled to admit on cross-examination that during the first seven months of her marriage her mother-in-law treated her kindly, and did all the house cleaning and other heavy work. Nor was respondent

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able to give subsequently any instances of a contrary disposition on the part of her mother-in-law, except respondent's statement that her mother-in-law made "snappish" complaints about the cleaning of some windows after respondent (on her second return to her husband) had assumed charge of the household work and duties, and also that her mother-in-law did not want her (respondent) to speak to anyone around there.

There is not a shadow of testimony tending to prove that appellant consented to, or connived at the absence of his wife; on the contrary, the evidence is abundant that he exerted all of his influence to get her to return.

The law is that it is the duty of the wife to share her husband's fortunes and to remain in his home, however humble, if it is all he can provide. *Messenger v. Messenger*, 56 Mo. 329, 337. If the husband sees fit to invite members of his family to live with him, his wife cannot on that account leave his home. *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. *loc. cit.* 300.

The application of these principles of law to these facts of this case demonstrate that respondent had no reasonable cause to absent herself from her husband. The only conclusion to be drawn from all the evidence is that her abandonment of her husband's roof was caused merely by her dissatisfaction with her lot as wife. She had voluntarily assumed that relation. The highest interests of society forbade her to renounce it at will.

Our conclusion is that appellant under this record is entitled to a divorce for the statutory grounds set forth in his petition. The judgment of the trial court is therefore reversed, and the cause remanded with directions to the circuit court to render a judgment herein in accordance with this opinion. All concur.

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## MICHAEL HANLON, Respondent, v. BENJAMIN O'KEEFE, 55 528 58 463 Appellant.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Replevin:** RIGHT OF SUCCESSFUL PARTY TO HOLD THE OTHER FOR CONVERSION PENDING THE PROCEEDING. The defendant, in an action of replevin retained the property in controversy by giving a forthcoming bond. The judgment in the action was in favor of the plaintiff, and gave him an election to take the property or its assessed value. The defendant, nevertheless, sold the property without affording the plaintiff any opportunity to take it under the judgment. *Held*, that the defendant was guilty of a conversion of the property, and that he was, therefore, answerable for its actual value at the time of the sale in a new action by the plaintiff on that theory.

2. ———: ELECTION BY SUCCESSFUL PARTY. The fact that an execution was issued under the judgment in the action of replevin, and that the defendant paid to the sheriff the value of the property assessed in that action, does not establish an election by the plaintiff under that judgment; accordingly, the plaintiff having refused to accept the collection from the sheriff, his right to the property remained unimpaired.

*Appeal from the St. Louis City Circuit Court.*—HON. JACOB KLEIN, Judge.

AFFIRMED.

*M. Kinealy*, *James R. Kinealy* and *R. S. MacDonald* for appellant.

(1) The petition did not set forth a cause of action. *White v. Van Houten*, 51 Mo. 577; *Donohoe v. McAleer*, 37 Mo. 312; 6 Wait on Actions and Defenses, 169; Revised Statutes, sec. 7494, p. 1734. (2) On the evidence the plaintiff ought not to recover. *Dwyer v. Reppetoe*, 10 S. W. Rep. 668; 1 Thompson on Trials, secs. 818, 819; also authorities cited *supra*.

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*John M. Dickson* and *A. A. Paxson* for respondent.

The defendant's instructions numbered 1 and 2 were properly refused. The instructions given by the court of its own motion correctly declared the law. Revised Statutes, 1889, secs. 7492, 7493, 7494, 7495; Revised Statutes, 1879, secs. 3857, 3858, 3859, 3860; *Swantz v. Pellow*, 50 Ark. 304.

Bond, J.—The petition filed in this case is as follows:

"Plaintiff states that, in May, 1888, he was the owner and entitled to the possession of a certain bay mare, and that defendant having fraudulently obtained possession of said mare, wrongfully detained her in his possession and refused to surrender the same to plaintiff; that plaintiff was thereupon compelled to bring, and did bring, an action of replevin before a justice of the peace in the city of St. Louis against said defendant for the recovery of said mare; that defendant, upon the institution of said suit, executed a forthcoming bond in pursuance of the provisions of the statute, and was entitled to retain possession of the property pending said action; that thereafter said cause was tried on appeal in the circuit court of the city of St. Louis on the —— day of ——, 1889, and, upon a trial thereof, judgment was rendered in favor of plaintiff for the possession of said mare; that defendant thereupon took an appeal from said judgment to the St. Louis court of appeals and filed a *supersedeas* bond, whereby he was enabled to continue in possession of said mare pending the appeal; that said appeal coming on to be heard in the St. Louis court of appeals, the judgment of the circuit court was affirmed in all things; that by the terms of said judgment plaintiff was entitled to the possession



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of said mare, should he so elect; that it was (as defendant well knew) plaintiff's intention and desire to so elect, but that defendant, for the purpose of defeating and frustrating such contemplated election on the part of plaintiff, on the —— day of ——, 1889, wrongfully and fraudulently converted said mare to his own use by selling her to a third party for the sum of one hundred and fifty dollars ($150), and causing her to be shipped beyond the limits of this state, and it has thus become impossible for the officers of this court to execute said judgment by delivering said mare to plaintiff according to his election.

"Plaintiff states that the conduct of defendant in the premises has throughout been fraudulent, vexatious and oppressive; that defendant well knew that he had no right in the first place to detain plaintiff's mare, and the appeal taken by him as aforesaid was (as defendant well knew) wholly without merit, and intended solely for vexation and delay, and for the purpose of affording him an opportunity to wrongfully deprive plaintiff of his property.

"Plaintiff states that, by reason of the premises, he has lost said mare and the use thereof, and has been compelled to incur large expenses in maintaining his legal rights, and has thereby sustained damages in the sum of five hundred dollars ($500), for which he prays judgment with costs."

The defense to the foregoing petition was: ***First***, a general denial; and, *second*, that in the replevin suit referred to in said petition a judgment was rendered in favor of the plaintiff for $45 as the value of the mare, and $10 as damages for her detention; that pending said replevin suit the defendant, believing himself the owner of the mare, sold her, and that the plaintiff, knowing of this sale, sued out an execution in the replevin suit on the judgment for her value and

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damages, the amount of which the defendant paid to the sheriff.

On the trial of the issues thus made, the plaintiff introduced so much of the record of the replevin suit instituted by him for the mare in controversy, as tended to show that judgment was rendered therein in his favor for the possession of said mare; which judgment on an appeal taken to this court was affirmed. 38 Mo. App. 273.

It also appeared from the record of the replevin suit so introduced in evidence that, during the pendency of that suit in the circuit court, the mare in dispute was in the custody of the defendant under a forthcoming bond, and, during the pendency of that suit in this court, the mare in dispute was in the custody of the defendant under a *supersedeas* bond. There was evidence tending to show that, before the affirmance of said suit in this court and while it was here on appeal, the defendant sold the mare for $150; that, after its affirmance, the defendant paid into the hands of the sheriff of the city of St. Louis $50 upon an execution in his hands issued in said replevin suit, but did not place the mare adjudged to belong to the plaintiff in the hands of the sheriff, to the end that the plaintiff might elect whether he would take the mare or her assessed value, as he was entitled to do by said judgment.

The plaintiff then applied for a rule upon defendant to produce said mare and turn her over to the sheriff, which rule was granted by the circuit judge, and thereafter, upon the affidavit of defendant filed in response to the rule so made, showing that he had sold the mare and she had been shipped out of the state, the rule was discharged.

There was other conflicting testimony as to the value of the mare in controversy.

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The case was tried by the court, sitting as a jury, and judgment rendered in favor of the plaintiff, from which the defendant has appealed to this court, and assigns as error: *First*, that the petition does not set forth a cause of action; *second*, that the court erred in giving its instructions and refusing those requested by appellant; *third*, that on the evidence the judgment should be reversed.

There is no merit in the first assignment of error. The petition alleges in substance that the plaintiff intended and desired under the judgment in the replevin suit in his favor to elect to take possession of the mare sued for, and that the defendant with knowledge of this intention, and to defeat such an election, wrongfully converted said mare to his own use by selling her to be shipped out of the state, so that she could not be delivered to the plaintiff under the judgment and process thereon in the replevin suit.

This was a sufficient averment of the rights of the respondent to the property converted by appellant. Nor is there any force in the contention of the appellant that the object of the present suit is to recover the value which was rightfully adjudicated in the replevin suit. The authority cited by him, *White v. Van Houten*, 51 Mo. 577, is to the effect that, where a judgment rendered in a replevin suit in favor of a defendant, omitting any assessment of damages for detention, has been specifically complied with by the delivery and acceptance thereof of the personal property adjudged in his favor, such defendant cannot in a *new* action sue for damages for the detention of the property recovered in a replevin suit, merely because on the trial of that action no evidence whatever was offered on the issue of damages for detention.

This decision rests upon the principle of the conclusiveness of a final judgment as to all the issues upon

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which it was obtained. *Damages for detention* are necessarily embraced in the issues in replevin. A judgment ignoring them for want of evidence is, therefore, conclusive, if unappealed from.

In the case at bar the judgment in the replevin suit, requiring the appellant to deliver the mare to the sheriff (to enable the plaintiff to elect whether he would take the mare and damages, or her assessed value and damages, in satisfaction), has never been complied with. This action is, therefore, for specific personal property which has been *adjudged* to belong to the plaintiff, and which the defendant has withheld and converted to his own use, thus rendering himself liable to the plaintiff, upon elementary principles, for the value of the property converted at the time of its conversion. Neither is there any force of reason in the point urged by appellant, that the execution of the forthcoming bond entitled him to sell the property for which such bond was given, so as to defeat the right of the plaintiff in the replevin suit to compel the production of this property in the event of his success. The right to recover the specific thing sued for in the action of replevin is secured to the prevailing party by the express terms of the statute regulating such actions. Revised Statutes, 1889, secs. 7489, 7490, 7492, 7493.

Forthcoming bonds in replevin are conditioned, primarily, for the *delivery* of the *property*, *when "adjudged,"* to the obligee. They confer no title on the obligor to the property retained in his possession, and do not legalize a breach by him of his express stipulation to deliver (under penalty) at the end of the suit. Revised Statutes, 1889, sec. 7482. Nor is there any authority for this position of the appellant in the case cited by him. *Donohoe v. McAleer*, 37 Mo. 312.

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This case merely decides that the plaintiff, having title to the property replevied *at the time* of the bringing of the suit therefor, is not precluded from ultimate recovery in such action, because, *after* the institution of his action, he may have sold and transferred the property in question; in other words, that in such actions it is the rights of a plaintiff *when* his suit is begun, and not his rights as they existed *subsequently*, which determine whether or not the suit was properly brought.

The first instruction requested by the appellant and refused by the court was properly refused, because it assumed a fact. It assumed as a fact that there was no evidence of the value of the horse sued for in the present action at the time of the affirmance of the replevin suit by this court, when the plaintiff therein was entitled to demand the production of the horse. This assumption is not consistent with the record in this case.

The court also did right in refusing the second instruction offered by appellant, because this instruction assumed that the plaintiff in this action had received the amount adjudged in the replevin suit as the value and damages for the detention of the horse in lieu of his right to the horse itself; for which assumption there is no support to be found in the evidence in this case.

The court, of its own motion, gave the following instruction: "If the court, sitting as a jury, finds from the evidence that, after the rendition of the judgment in the replevin suit between these parties, the record of which has been offered in evidence, being case number 77036 of the circuit court, city of St. Louis, and before the affirmance of said judgment by the court of appeals, on December 3, 1889, the defendant did without the consent of the plaintiff sell and dispose of the mare in question, and receive and retain to himself the proceeds

of such sale; and if the court shall further find from the evidence that the defendant never did deliver the said mare into the custody of the sheriff after the affirmance of said judgment in said replevin suit by the court of appeals, and that by the conduct of said defendant the said plaintiff was deprived of his right of election to take said mare or the value thereof as assessed in said replevin suit, which right of election the said plaintiff was not bound to exercise, as the court declares the law to be, until the defendant delivered the custody and possession of said mare into the hands of said sheriff upon the execution in favor of plaintiff in said cause read in evidence, then the verdict should be for the plaintiff.

"And if the court shall so find, it should assess the plaintiff's damages at such a sum as it may find from the evidence to be fair and reasonable market value of said mare at the time the defendant sold her (if he did so sell her); and the court may, if it shall think fit under the circumstances shown in the evidence, give additional damages in the nature of interest over and above the value of the said mare, as the same may be found by the court at the time same was so sold by defendant."

The foregoing instruction was a clear and comprehensive statement of the law applicable to the issues and facts in this case, and is not open to any just criticism on the part of appellant.

We must also overrule the assignment of error to the effect that, under the evidence in this case, the judgment should be reversed. There is no testimony whatever that the plaintiff in this action ever *received* the amount assessed as the value of the mare and damages for her detention in the replevin suit in satisfaction of his right to her recovery in *specie;* on the contrary,

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the evidence is that he refused to accept such assessment, when tendered him.

The fact that the sheriff collected the same does not affect or impair the right of the plaintiff to the specific property, *i. e.*, the mare, which he recovered in his replevin suit. Revised Statutes, 1889, sec. 7495. The plaintiff still had the right to demand the surrender of the specific property recovered by him, and could only be compelled to make his election after the same had been delivered into the hands of the sheriff on proper process and upon notice to the plaintiff. . Revised Statutes, 1889, sec. 7493.

The sheriff, in collecting the assessed value and damages for the detention of the horse adjudged to the plaintiff, was merely discharging a plain statutory duty (Revised Statutes, 1889, sec. 7494), which in no wise prejudiced the rights of the plaintiff. The only way he could be debarred from claiming title to the property adjudged to belong to him in the replevin suit was by election, after the property itself had been placed in the hands of the sheriff, to receive its assessed value and damages rather than the property itself.

We have examined the record in this case, and our conclusion is that there was no reasonable ground for the appeal taken to this court; that the errors assigned here are in contravention of the plain statutes, *supra.*

We, therefore, affirm the judgment of the lower court with ten per cent. damages. It is so ordered. All concur.

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HENRY KRAH *et al.*, Appellants, v. AUGUST WEIDLICH *et al.*, Respondents.

**St. Louis Court of Appeals, December 19, 1893**

**Mechanics' Liens:** WORK ON PROPERTY NOT DESCRIBED IN LIEN ACCOUNT. *Held*, in the course of discussion, that a mechanics' lien cannot be established for work, or against property, broader than the

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**statements of the lien account and, therefore, that work done on an outhouse cannot be considered in determining the date of the accrual of the lien account, when the lien is filed against the main building only.**

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*F.* and *Ed. L. Gottschalk* for appellants.

*T. J. Rowe* and *John W. Benstein* for respondents.

BOND, J.—This is an action to enforce a mechanics' lien brought against the contractor and the owner of the building. The defense was a general denial.

The lien claim sued on was sworn to on January 20, 1892. The description of the property given in the lien is: "To-wit, two-story brick building, and situated in the following described premises, to-wit." The evidence was that appellants rendered the following bill for same work for which this suit was brought:

ST. LOUIS, September 12, 1892.

*Mr. August Weidlich to H. Krah & Son, bricklayers and contractors, Debtor.*

| | |
|---|---|
| For work on house on Clark avenue, south side, between Grand avenue and Thresa avenue, Mr. Hines, as per contract | $ 659 00 |
| August 15, by cash account | 319 00 |
| Balance due | $ 340 00 |

There was substantial evidence adduced by respondents to the effect that appellants never did any other work on the building after the presentation of this bill. There was some evidence on the part of appellant that a small outhouse was built between the twentieth and twenty-fifth of October. In actions at

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law, appellate courts do not weigh conflicting evidence. In the case at bar, the most appellant can claim under the record is that the evidence was conflicting as to whether or not any work was done on the building specifically described in the lien claim between the twelfth of September, 1892, and the twentieth of January, 1893, a period of over four months.

The trial court sitting as a jury found this controverted fact upon substantial evidence for respondent. We are, therefore, concluded by that finding. Nor do we think the work upon the out-house *(privy)*, even if the trial court had found that it was done within four months next before the filing of the lien claim, would have entitled the appellants to a lien on the building described herein. That description is *specific*, and excludes any lien for improvements not embraced within its terms. According to the lien account, appellants were entitled for work done on "a two-story brick building." This is the definite description to which appellants restricted themselves in their lien account. Appellants cannot establish a lien for work, or against property, broader than the statements of their lien claim. Revised Statutes, 1889, section 6709.

The result is that the judgment of the trial court herein is affirmed. All concur.

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JOHN LYSAGHT *et al.*, Appellants, v. ST. LOUIS OPERATIVE STONEMASONS' ASSOCIATION, Respondents.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Mandamus:** EXPULSION OF MEMBER BY CORPORATION. A corporation whose members have property rights in it has no power to expel a member without due notice to him of the grounds of the proceeding and a trial at which he has been afforded an opportunity to be present. When a member has been expelled in violation of this rule, he may compel the restoration of his privileges by *mandamus*.

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2. ———: ———. When the laws of a mutual benefit society provide for the payment of benefits to defray the funeral expenses of members and of their wives, the members have property rights in the society within the purview of this rule.

3. **Mutual Benefit Society:** LEGALITY OF BENEFITS. The charter of a benefit society set forth that one of the objects of the association was to afford relief, comfort and protection to members, and empowered the association to make by-laws to carry out those objects. *Held,* that the adoption of a by-law for the payment of benefits to defray the funeral expenses of members and of their wives was authorized thereby.

4. **Corporations:** DEFENSE OF ULTRA VIRES. *Held, arguendo,* that a corporation cannot plead *ultra vires* against an act by it *merely in excess* of its charter authority, where the consideration has been received by it and the transaction has been executed by the other party.

*Appeal from the St. Louis City Circuit Court.*—HON. LEROY B. VALLIANT, Judge.

REVERSED AND REMANDED.

*M. McKeag* for appellants.

(1) The appellants have shown sufficient property rights in the respondent corporation to entitle them to maintain this proceeding. *Ludowiski v. Benevolent Society,* 29 Mo. App. 337; *State ex rel. v. Merchants' Exchange,* 2 Mo. App. 96; *State v. Georgia Medical Society,* 38 Ga. 608; *State ex rel. v. Benevolent Society,* 72 Mo. 146. (2) The averments of the petition are sufficiently specific. *State ex rel. v. Railroad,* 77 Mo. 143; *School District v. Lauderbaugh,* 80 Mo. 190; *State ex rel. v. Smith,* 104 Mo. 661. (3) The right of the relators to membership in this incorporated association was pecuniarily valuable, and it does appear that they were members in good standing, and that they were deprived of their right of membership without a hearing and without cause. This is not a case where they violated any of the charter provisions or by-laws, so far

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as appears of record. *State v. Grand Lodge*, 8 Mo. App. 148; *Steele ex rel. v. Benevolent Society*, 42 Mo. 485.

*C. P. & J. D. Johnson* and *Joseph L. Laurie* for respondent.

The lower court properly sustained respondent's motion to quash the alternative writ, for the reason that on the face of the writ the relators were not entitled to the relief prayed for. *State ex rel. v. Governor*, 39 Mo. 388; *State ex rel. v. Odd Fellows*, 8 Mo. App. 148; *People v. The Board of Trade*, 80 Ill. 136; *State ex rel. v. Paint Co.*, 21 Mo. App. 526; *State ex rel. v. Fladd*, 26 Mo. App. 500; *People v. Masonic Ass'n*, 98 Ill. 632; *State ex rel. v. Temperance Benevolent Society*, 42 Mo. App. 485–490.

Bond, J.—This is an application for a *mandamus* by plaintiff against defendants upon the following petition, which was sworn to, to-wit:

"The petitioners herein, John Lysaght, Patrick Touhey, Philip Emmerich, John Emmerich, Paul Kostich, George W. Bickel, Denis O'Leary, William J. Campbell, John J. Schneider, R. H. Eddy and Joseph Weisemeyer, respectfully represent to the court that the General Assembly of the state of Missouri by an act entitled "An act to incorporate the St. Louis Operative Stonemasons' Association," approved February 23, 1853, duly incorporated the St. Louis Operative Stonemasons' Association, a body politic, to have perpetual succession, and provided that it may be sued.

"The objects of said association, as appears in section 2 of said act, was for the encouragement of the stonemasons' trade, to furnish deserving members employment when they need the same, to afford relief,

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comfort and protection to sick of (or) unfortunate, needy, and also to promote industry, benevolence and temperance among the members of said association. For the purpose of carrying out these objects of said association it is empowered by said act to make rules and by-laws: Provided, however, that the same be not repugnant to, or against, good morals, the laws of the United States or the state of Missouri. By the terms of said act it is further provided that the business and management of said association is to be under the control of a president, vice-president, secretary, treasurer and standing committee, to be elected and chosen by the members of said association from time to time, as they may deem necessary for their interest.

"That by the terms of a by-law of said association all persons who are by occupation operative stonemasons and residents of the city of St. Louis are eligible to membership in said association, and an initiation fee of $5 is required to be paid to said association by the person initiated, and, in addition to said fee, a monthly contribution of fifty cents from the first of April to the first of December, and for the other four months of the year twenty-five cents each, to commence from the date of his election.

"It is further provided by a by-law of said association that, when a member has paid twelve months prior to his death all dues and arrears, the sum of $75 will be paid by the association towards the defraying of the dead member's funeral expenses. It is also further provided by its by-laws that, at the death of a member's wife, who has complied with the above rule, he shall be entitled to draw from the treasury the sum of $40 to assist in defraying her funeral expenses.

"Plaintiffs further state that they are all stonemasons by trade, and have worked for many years at

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said trade and are residents of the city of St. Louis, and duly and properly qualified to be members of said association. That all of them were duly elected and qualified for more than one year next before the —— day of December, 1892, and paid all of the dues and initiation fees required of them as such members, and enjoyed all the privileges of membership of said association, and were all members in good standing up to said —— day of November, 1892.

"Plaintiffs further state that on some day after the said day of November, A. D., 1892, the date of which is unknown to them, without any notice to your petitioners, the said defendants, the officers and committee or high court of said association, namely, Patrick T. Walsh, its president; Christian Bauer, vice-president; Patrick J. Costello, secretary; Gustav Schneider, treasurer, and Martin Widmer, Philip Kustner, Gustav Wiegert, Robert Smithanna, Charles La Walles, Edward Harvey, John J. Byrnes, William Evans, Francis Noonan and Richard Lyons, notwithstanding that they, the plaintiffs, were all members in good standing, the said officers and committee, actuated by malice and by a determination to deprive these plaintiffs by a corrupt, arbitrary and illegal use and construction of the powers vested in them by the charter and special act hereinbefore referred to, presented to the members of said association, without notice to these petitioners, unjust, illegal and damaging charges against your petitioners, and undertook without notice to said plaintiffs to charge upon the books of said association unjust, illegal and oppressive fines against your petitioners, and afterwards dropped the petitioners' names from the rolls of the said association and expelled them therefrom, and have frequently refused to permit your petitioners to participate at the meetings of said association, and at the election of officers

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and a committee for said association, as provided by said act, and have failed and refused to reinstate your petitioners to all the privileges of membership in said association, and to remit the fines thus illegally and corruptly assessed against them.

"Plaintiffs further state that the action of said officers and committee was not the exercise of a discretion lawfully pertaining to the objects of said association, as set forth in the act creating it, or the carrying out the purposes for which it was created, but a usurpation of power by them only to oppress and unjustly and illegally deprive the plaintiffs of the benefits of said association, and of the use of all the fees and intiation fees paid by them to said association.

"Plaintiffs further state that, to carry out their malicious oppression and illegal designs and determinations the said officers notified all the other members of said association, not thus expelled, that it would be a cause of expulsion should they, or either of them, work at mason work at any building where your petitioners were working, and illegally and maliciously reported the work of one McCully as blackened where your petitioners were working, and prohibited all members from working thereon.

"Plaintiffs further state that they are remediless in the premises by or through ordinary process of law, and they therefore pray this honorable court to award against said corporation, officers and committee, a *mandamus*, commanding them, and each of them, to expunge from the books of said association all illegal and oppressive fines charged against your petitioners thereon, and that their names be again placed on the rolls of said association as members thereof, and that they be reinstated to all of the privileges of said association, and for such other and proper relief as the

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plaintiffs may be entitled to, and for their costs in this proceeding expended."

An alternative writ was issued commanding the defendant to restore and place the names of petitioners on the rolls of the defendant corporation, or show cause why they should not do so. The defendants appeared, and moved to quash said alternative writ for the following reasons. *First.* That the pleadings showed that no property rights were involved; wherefore plaintiffs could suffer no substantial damages and were not entitled to a writ of *mandamus*. *Second.* That it did not appear that the plaintiffs had exhausted the methods of redress which the corporation itself furnished to its members, or that they were without other adequate remedy.

The plaintiffs thereupon moved the court for a peremptory writ of *mandamus*. Upon the hearing of these motions the court overruled the plaintiff's motion for a peremptory writ, and sustained the defendant's motion to quash the proceedings, to which ruling of the court the plaintiffs duly excepted. Afterward the parties appeared, and, plaintiffs declining to plead further, the court rendered judgment for said defendants, from which an appeal was taken to this court. The error assigned on this appeal is the action of the lower court in sustaining the defandant's motion to quash.

*Mandamus* is the most appropriate remedy to restore or induct one into the enjoyment of the privileges of an incorporated association, of which he is unlawfully and unreasonably deprived. *People ex rel. Medical Society of Erie*, 32 N. Y. 187; *State ex rel. v. White*, 82 Ind. 278. The courts, however, restrict the application of this remedy to cases where the relator is deprived of some pecuniary right. Subject to this limitation, it is applicable to corporations formed for

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the purpose of gain or to incorporations for religious, benevolent or social ends.

No member of any of these organizations can be deprived of any substantial right or privilege as such by the enforcement of an illegal by-law, nor by expulsion upon any ground not recognized at law as a sufficient cause for such action. *State ex rel. v. Medical Society*, 38 Ga. 608; Spelling on Extraordinary Relief, sections 1606, 1607 *et seq.* The only question, therefore, to be determined on this appeal is, whether or not the petition shows on its face that the relators have been deprived by the defendant corporation, or its officers acting in this behalf, of a pecuniary right by their expulsion from the organization; since it is clear, if it should be held that relators were illegally expelled from the corporation, that they would not have any other remedy for their restoration as specific or effectual as *mandamus*. Spelling on Extraordinary Relief, sections 1606, *supra*. *State ex rel. v. Temperance Benevolent Society*, 42 Mo. App. 485.

The question is, therefore, the legality of the action of the corporation through its officers in denying relators the benefits of membership under the allegations contained herein; for in this case the parties have substituted the petition for the alternative writ, although the latter is properly the first pleading in the proceeding, and the basis of all the issues therein, either of law or fact. *State ex rel. v. Railroad*, 114 Mo. 289; *Hambleton v. Town of Dexter*, 89 Mo. 188.

In looking to the allegations of the petition for the solution of this inquiry, we find that the expulsion was accomplished upon charges and a hearing thereon, made and conducted without any notice whatever to relators. It is true we are not specifically informed what these charges were, but the petition does state



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affirmatively that the relators were at the time in no default as to their pecuniary dues, and were then in the full observance of all their duties as members; and that the charges preferred against them in their absence and without notice were malicious, illegal and unjust. As petitioners had no opportunity of knowing or meeting the said charges, we do not see how they could be required to state them with more particularity. It is the law of this state that corporations, whose members have property right therein, have no power of suspension or expulsion without due notice of the grounds of such action and upon a trial thereof, at which the parties charged might have been present. *Ludowiski v. Benevolent Society*, 29 Mo. App. 337; *State ex rel. v. Temperance Benevolent Society*, 42 Mo. App. 490 *et* citations.

That relators had a "property right" in the defendant corporation we think sufficiently appears from the statements in the pleadings.

In *Ludowiski v. Benevolent Society, supra*, the evidence showed that the corporation had a "*sick benefit.*" In construing this phrase, the court said: "Which we understand to be an allowance to members when they are sick. The plaintiff, therefore, had *property rights* in the society, and the society had no jurisdiction to deprive him of those rights" by expulsion. The only difference between the facts of that case and the one at bar is that there the court deduced a property right from the evidence of a "sick benefit;" whereas, in this case, the property right *exists* by reason of a death benefit to each member of $75 for himself and $40 for his wife.

There is no difference in principle between the two cases. The respondent argues that this pecuniary benefit secured to the members rests upon a by-law which is unauthorized by its charter. It is doubtful, if this

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point were well taken, whether the respondent, having received the consideration (initiation fees and dues) for this provision, would not be estopped from pleading a mere want of authority to enact the by-law.

The law is that, for acts *merely in excess* of charter authority corporations can not set up the defense of *ultra vires*, where the consideration has been received and the transaction executed by the other party. We think, however, the point has no support in the language of the charter empowering the respondent to adopt by-laws.

The charter in broad terms set forth as one of the objects of the association: "To afford relief, comfort and protection" to the members; and it empowered the passage of lawful by-laws to that end. We hold that this was ample authority for the by-law in question.

Respondent also insists that this "pecuniary provision" is not of that substantial character which is referred to by the courts in speaking of property rights. The answer is, that it is of the same character, *i. e.* money, which was termed a "property right" in *Ludowiski v. Benevolent Society, supra.* Nor do we accord any persuasive force to the Illinois authority (*People ex rel. v. Board of Trade*, 80 Ill. 134), cited by respondent. That case put the refusal of the court to award the writ on the ground that the board of trade was authorized to discipline, and, to that end, to suspend or expel its members, in accordance with its regulations, to which each member had agreed in joining the body. This court has taken a contrary view of the power of the courts to control the action of a board of trade in expelling a member for noncompliance with its by-laws. *State ex rel. v. Merchants' Exchange*, 2 Mo. App. 96; *Albers v. Merchants' Exchange*, 39 Mo. App. 583.

The result is that the circuit court erred in its conclusion that the petition (alternative writ) did not

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show any property rights in relators, and its judgment sustaining the motion to quash on that ground is reversed and the cause remanded. All concur.

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BERNARD DENGLER, Respondent, v. ANDREW AUER *et al.*, Appellants.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Stated Account:** BUILDING CONTRACT When the parties to a building contract have agreed upon the amount due for a specific portion of the work, and the one who owes the amount thus agreed upon has paid it in accordance with the terms of the settlement, the other is debarred from making any further claim for the work.

2. **Building Contract, Breach of:** MEASURE OF DAMAGES. When there is a breach of an agreement by a contractor to erect a building within a stipulated time, the value of the use of the building, while the owner is delayed in its occupancy by the fault of the contractor, is recoverable as damages.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL DILLON, Judge.

REVERSED AND REMANDED.

*Lubke & Muench* for appellants.

(1) Plaintiff having received from defendants the sum of $200 after any indebtedness was denied by defendants, and upon a written agreement that this covered all millwork in the building, it was error for the court below to allow a lien of $254 for this work, as as it did by its declarations of law. Plaintiff was estopped from making such claim. Phillips on Mechanics' Liens, secs. 272, 273. The transaction amounted to a settlement between the parties at least of the item of millwork, and must stand as the parties adjusted the same. *Harmon v. Waller*, 2 Mo. Leg. News, 538.

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(2) The contract provided a penalty or measure of damages for delay in completing the building. The great weight of evidence was to the effect that defendants were able to occupy the building only on July 2, instead of May 1, 1892, as stipulated. The price fixed by the contract was $5 per day. In the absence of countervailing evidence this sum should be the measure of damages, and the court erred in refusing any declaration of law on this subject. *McConey v. Wallace*, 22 Mo. App. 377.

*Rassieur & Schnurmacher* for respondent.

Bond, J.—This action was brought for balance due for work and material furnished in the construction of a building belonging to the appellant, and the enforcement of a mechanics' lien therefor.

The defense was that the house was built under a written contract for a specific amount; that this contract was subsequently modified, whereby it was reduced to the sum of $1,626; that the respondent, having broken this contract in various particulars, on August 8, 1892, had an accounting with the appellants and a settlement of all contested claims between them, whereupon appellants paid the respondent the sum of $200 in cash, which was received in full discharge of all claims against them on said contract. For a second defense the answer set forth the particulars in which respondent had broken said contract, and asked a recoupment in the sum of $943.02.

The case was tried before the court sitting as a jury, which rendered judgment in favor of the respondent for $400.13, and in favor of the appellants on their counterclaim for $72.80, leaving a balance of $327.33 in favor of respondent, for which a lien was established against the property of the appellants. On

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appeal from said judgment, the errors assigned are: *First.* That the court found for the respondent according to the wall measurements pointed out by section 8863 of the Revised Statutes, 1889. *Second.* That the court erred in allowing a lien in excess of $200 for millwork on the building. *Third.* That the court erred in not upholding the counterclaim of the appellants for work and material not furnished by the respondent, and in not declaring the law as to the measure of damages to which the appellants were entitled for delay of respondent in completing the building; and that the court erred in the reception of evidence, and in not limiting its finding to the measurements made by Mr. Hill under the agreement of the parties.

The contract for the building required it to be completed on or before May, 1892, under the penalty of $5 forfeit for delay, not unavoidable or caused by appellants, each day thereafter.

The evidence was conflicting as to the time of the completion of the building, the testimony ranging from April to August, 1892. The respondent testified that certain changes were made in the specifications, and as to the omission, by agreement, of the painting (amounting to $292) required under the contract; and that the value of the work and material that went into the building was $1,626.

For the purpose of securing evidence as to the number of bricks used in the building the parties entered into the following agreement: "And it was agreed by both parties that Mr. J. W. Hill, a professional measurer, shall take the measurements of the actual brick that went into said improvement, and submit them to the court at the close of the case. The report of the number of bricks made by Mr. Hill under this agreement, if calculated at the prices charged by the respondent in his account, would tend to prove that

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respondent had overcharged the appellants $97.45, and had also overcharged them for laying more brick than actually furnished (according to this report) the sum of $58.94.

Witness Krah testified that a larger number of brick than reported by Mr. Hill, but a lesser number than set forth in respondent's account, went into the building.

The evidence also tended to prove that on the eighth day of August the parties discussed the matter of a settlement, when the following order was drawn, and the following receipts were executed:

"St. Louis, August 9, 1892.

"*Mr. A. Auer:*—Please pay to A. Kuenzel for all mill work furnished for your annex, in full, two hundred dollars ($200).

"(Signed) B. Dengler."

This order was paid by Mr. Auer on August 12, 1892, and receipted for by A. Kuenzel, as follows:

"Received of Mr. A. Auer, in full for all mill work furnished for the annex, carving included."

And on the giving of this order, and Mr. Auer's promise to pay it, Dengler gave Auer the following receipt:

"Received, St. Louis, August 8, 1892, from Andrew Auer $200 for millwork, lumber and material furnished and delivered, at, in or about premises on Rappahannock street and Grand avenue, including all services and repairs, also for labor paid."

The testimony of the parties as to this transaction was conflicting: Respondent stated that his receipt was given, as above, so that "all those subcontractors" could make no claim against the building. On the other hand, appellant Auer stated that the order was given, and the receipt taken, for the purpose of

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discharging all the liabilities on the building contract by the payment of the amount ($200) of the order.

There was no evidence of measurements of the building, so as to apply the statutory rules for computation of the brickwork. Respondent's accounts for the reasonable value of the article sued for showed an aggregate charge of $16.26, being the exact price fixed in the contract, after deducting the agreed sum of $292 to cover cost of painting to be done by appellants. The above aggregate of respondent's charges included items for millwork as $254.

We cannot see, under this state of the record, any basis for the first assignment of error. The appellants concede that no evidence of the dimensions of the building was adduced for the purpose of ascertaining the brickwork according to the statutory rule. Revised Statutes, 1889, section 8863. The court could not in the absence of such evidence reckon the wall measurements by the statutory process, and, therefore, committed no error in declining the declaration of law tendered by appellants, to the effect that the statute in question had no application in this case. If there had been sufficient evidence of the *data* prescribed by the statute for calculating *wall* measurements, it would have been competent for the court to resort to the statutory rule, even if there had been no reference to it in the pleadings. The filing of a lien account for the material embraced in the statute necessarily implies its application. *Doyle v. Wurdeman*, 35 Mo. App. 330.

The second assignment of error is based upon the refusal by the court of the following declaration of law, requested by appellants:

"2. As to the millwork the court declares the law to be that, if the defendants received the order of plaintiff read in evidence, and paid the mill owner the amount of $200, mentioned therein, on the faith of the

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language of said order and the receipt written thereon, then plaintiff cannot now recover a lien herein allowing for such mill work in excess of a price of $200."

This declaration of law was based upon the theory of the evidence presented by the testimony of Auer, to the effect that there was a settlement in conformity with the recitals in the order and the mill owner's receipt, which discharged both his claim and all claim of respondent for any balance due on the building. The declaration of law presented this view of the evidence, was supported by substantial testimony, and was aptly framed; and its refusal was error.

The court did not err in refusing the declaration of law requested by appellants as to their counterclaim for delay, because it was erroneous in form, in that it assumed a fact. On a retrial a proper instruction on this subject should be given.

The law is that for a breach of a contractor's stipulation to build in a certain time, the value of the use of the building, while the owner is delayed in its occupany by the fault of the contractor, is recoverable as damages. *Shouse v. Neiswaanger*, 18 Mo. App. 236; *Ruff v. Rinaldo*, 55 N. Y. 664; *McConey v. Wallace*, 22 Mo. App. 377.

These conclusions involve the reversal of the judgment of the trial court, which is accordingly done, and the cause remanded. All concur.

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J. W. Whipple, Respondent, v. Peter Cooper Building and Loan Association, Number 4, Appellant.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Pleading:** INSTRUCTIONS. A plaintiff must recover, if at all, on the cause of action stated in his petition. Accordingly, when the petition alleges one contract and its breach, and the answer denies these allegations and states another and wholly different contract, an instruction which authorizes a recovery for the breach of the latter contract is erroneous.
2. **Practice, Trial:** MOTION FOR NEW TRIAL: EXCEPTIONS TO INSTRUCTIONS. Exceptions to instructions given by the court need not be taken specifically; a general exception addressed to the instructions in the aggregate will suffice

*Appeal from the St. Louis City Circuit Court.*—Hon. Daniel D. Fisher, Judge.

Reversed and remanded.

*Frank E. Richey* and *W. M. Kinsey* for appellant.

The court erred in submitting the case to the jury upon an issue of fact not raised by the petition. *Glass v. Gelvin*, 80 Mo. 297; *Clements v. Yeates*, 69 Mo. 625; *Stix v. Matthews*, 75 Mo. 99.

*Edmond A. B. Garesche* and *William L. Murfree* for respondent.

Rombauer, P. J.—The only substantial question arising on this appeal is, whether the court erred in submitting, by an instruction to the jury for their finding, an issue not made by the pleadings. The point arises in this manner: The petition charges the following facts. The plaintiff, being about to build a

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house, borrowed from the defendant the money for so doing. By the terms of the loan the defendant undertook to become the plaintiff's disbursing agent, and agreed to superintend the erection of the house, and to audit and pay all bills out of the money loaned. It was part of the defendant's duty, under the contract, to take from the contractor a bond of indemnity to protect itself and the plaintiff against mechanic's liens filed against the building. It also became the defendant's duty, under the contract, not to pay to the contractor at any time an amount, rendering the total payments made to him in excess of eighty per cent. of the sums actually expended by him. The petition then avers that the defendant violated its aforesaid duties by failing to take from the contractor the aforesaid bond of indemnity, and also by paying him in excess of eighty per cent. of his expenditures; that the contractor absconded, leaving a number of claims against the building unpaid, whereupon sundry persons filed liens against the building for labor and material to the amount of $680.66. These liens the plaintiff paid for the protection of his property, and he now prays for judgment for this amount against the defendant.

The answer of the defendant denies these allegations, and states, in substance, that the indemnity bond mentioned in the petition was waived by the plaintiff in consideration that the defendant would disburse under plaintiff's order the money arising from the loan, and applicable to the building, for the payment of material-men, laborers, and others; that the defendant did disburse all the money under plaintiff's orders, so that no lien accrued by reason of any neglect on the part of defendant; that the liens were the result of the contracting by plaintiff for a more expensive house than the money would pay for, the amount of the liens representing less than such excess.

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The answer was denied by reply.

It will be thus seen that the issue presented by the petition is, that the defendant violated its contract obligations in failing to take an indemnity bond from the contractor, and in paying him in the aggregate over eighty per cent. of the amount of his expenditures, in consequence whereof certain liens were filed against the building, which liens the plaintiff was compelled to discharge. The answer of the defendant was a simple denial, an assertion that an indemnity bond was waived, and, as evidencing such waiver, an affirmative allegation that all moneys expended were expended upon plaintiff's orders. Touching the waiver of the indemnity bond by the concurrent action of the plaintiff and defendant there was no substantial controversy, and the court assumed that such waiver had been fully established. There was no evidence tending to show that the liens were the result of the defendant's dereliction, and the court did not submit that question to the jury. There was no evidence that the defendant had paid to the contractor more than eighty per cent. of his expenditures, the showing on that subject being at best conjectural, and no evidence whatever that an excessive payment to the contractor had anything whatever to do with the filing of these liens. There was irrefragable evidence that all the money paid out by the defendant, except the sum of $218, was paid out upon the plaintiff's orders. In regard to this $218 the evidence was conflicting. This money had been paid to the contractor by the defendant, and the plaintiff admitted that one subsequent payment for $274 was made to the contractor by the defendant upon his, the plaintiff's order, given with a full knowledge of the previous payment of $218.

This being in substance all the evidence bearing upon the point of inquiry, we must hold that the court

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erred in giving on its own motion the following instruction:

"The court further instructs the jury that, if they find from the evidence that defendant paid out the $8,500 in question, $2,350 at the direction of plaintiff on his lot in question, and the balance, except $218.39, under and in pursuance of the orders signed by plaintiff and offered in evidence, then the court instructs you in reference to the second count in plaintiff's petition, he is not entitled to recover for anything, unless it be for $218.39 paid by defendant to Clayton on or about August 11, 1891; and if you find and believe from the evidence that said sum of $218.39 was paid by defendant to Clayton at the direction or request of plaintiff, or that, after such payment had been made, plaintiff ratified and acquiesced in such payment, then you will find in favor of defendant on said second count. But if you find and believe from the evidence that said payment was not made at the direction or request of plaintiff, and that he did not afterward ratify or acquiesce in the same, and further find from the evidence that said sum, when paid, was in excess of eighty per cent. of the sum which had actually been expended upon said building in question, and that it was the understanding and agreement of the parties that defendant should not pay to said Clayton or to his subcontractors and material-men at any time more than eighty per cent. of the sum actually expended on said building, then the jury will find for the plaintiff on said second count for the sum of $218.39 and interest thereon at the rate of six per cent. per annum since the date of filing this suit, viz., February 23, 1892."

It has always been the law of this state that the plaintiff must recover, if at all, on the cause of action stated in his petition. It is only when the variance

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between the allegation in the pleading and the proof is not material, but the court may direct the fact to be found according to the evidence, or may order an amendment of the pleadings. Revised Statutes, 1889, section 2097. As the trial issues must be within the paper issues, instructions must be framed with regard to the paper issues made. *Link v. Vaughn*, 17 Mo. 585; *Ensworth v. Barton*, 60 Mo. 511; *Hubbard v. Railroad*, 63 Mo. 68; *Iron Mountain Bank v. Armstrong*, 62 Mo. 70; *Clements v. Yeates*, 69 Mo. 623; *Stix v. Mathews*, 63 Mo. 371; *Glass v. Gelvin*, 80 Mo. 297; *Feurth v. Anderson*, 87 Mo. 354.

An insufficient averment in a petition may be helped out by an answer supplementing it; *Krum v. Jones*, 25 Mo. App. 71; *Henry v. Sneed*, 99 Mo. 407; but, in such an event, the recovery is still on the petition and not on the answer. Where the petition states one contract, and the answer states another and wholly different contract, denying the contract stated in the petition, we are aware of no rule which would entitle the plaintiff to a recovery upon a bare showing that the defendant had not complied with the contract stated in the answer. The case last put presents a case of failure of proof and not of variance, and is governed by section 2238 of the Revised Statutes and not by the provisions of sections 2097.

The plaintiff claims that this point has not been properly saved. The bill of exceptions recites that the defendant excepted to the instructions using the noun in the plural. The motion for new trial, complains of this particular instruction, and of the fact that the case was submitted to the jury upon an issue of fact not raised by the pleadings. The practice in many states requires specific exceptions to the charge of the judge, and disregards exceptions taken to instructions as a whole, unless the whole charge is erroneous. The

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practice in this state, however, has always been to the contrary, and an exception to instructions generally was always considered sufficient without pointing out in detail the specific instruction challenged.

It results that the judgment must be reversed and the cause remanded. So ordered. All concur.

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JAMES A. SMITH, Respondent, v. CARONDELET ELECTRIC LIGHT AND POWER COMPANY, Appellant.

**St. Louis Court of Appeals, December, 19, 1893.**

**Conclusiveness of Verdict in an Action at Law.** The verdict of the jury on questions of fact, submitted under proper instructions, is conclusive in an action at law, if it is supported by substantial evidence.

*Appeal from the St. Louis City Circuit Court.*—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

*H. D. Wood* for appellant.

*Seneca N. Taylor* for respondent.

BOND, J.—This is an action for damages for breach of a contract for the delivery of ice. This contract was entered into on the twelfth day of April, 1892, between the respondent and the appellant. By the terms thereof the appellant agreed to sell and deliver to respondent fifteen hundred tons of good, merchantable ice in quantities of one car load per day, all of said ice to be delivered on or about the twentieth day of June, 1892; and agreed, further, that, if he had on hand a sufficient quantity of ice to enable him to deliver more than one car load per day, any amount so delivered in excess of one car load per day might be taken in addition to, or considered a part of, said fifteen hundred tons of ice, as respondent might elect. The

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appellant further agreed to sell and deliver said ice for the sum of $2.20 per ton, except in case car loads should be delivered at appellant's plant; in that event all freight to Chouteau avenue to be deducted.

The respondent agreed to buy fifteen hundred tons of ice as above stated, and to pay for the same in cash on delivery. It was further agreed between the parties that appellant should not be liable for any damages arising from any failure to deliver said ice as above agreed, caused by any defect or failure in the operation of said company's ice plant to manufacture merchantable ice in sufficient quantities for delivery under this contract.

It was alleged in respondent's petition that he had paid on account of said contract the sum of $3,207.30; that appellant had only delivered to respondent eleven hundred and fifty-two tons and three hundred pounds, leaving a deficit of ice of three hundred and forty-seven tons and seventeen hundred pounds, to which respondent was entitled by the terms of said contract; that, on the twentieth of June, respondent extended the time, by agreement with appellant, for the delivery of ice under said contract at the rate of one car per day thereafter, until the entire contract was filled; that, on the twelfth of July, appellant ceased and refused to deliver any more ice; wherefore the respondent prayed judgment for the market value of the ice undelivered.

The answer of the appellant admitted the execution of the contract, and set up that by its terms appellant was to deliver, and respondent was bound to receive, said ice in quantities of one car load per day; that appellant commenced delivering the ice on April 15, and continued to deliver at the rate of one car load per day until April 20, when respondent requested appellant not to deliver any ice for a period of ten days; that appellant accordingly abstained from delivering ice during said

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period of ten days at respondent's request; that afterwards, on the thirteenth, fourteenth and fifteenth days of May, 1892, appellant again abstained from delivering ice at respondent's request; that, by reason of these acts, respondent waived the right to require the delivery of the quantity of ice which he was by the contract entitled to receive, to-wit, one car load of ice per day for thirteen days, amounting to two hundred and sixty tons of ice. The answer also set up the delivery of two hundred and thirteen tons of ice under the contract, which was in all respects of the quality therein called for, but that respondent claimed that it was not merchantable ice, and declined to receive it under the contract unless the price was reduced from $2.20 to $1 per ton; that thereupon appellant reduced the price to $1 per ton, and respondent received same under said contract. The answer further stated that appellant delivered eleven hundred and fifty-two tons of ice at the rate of one car load per day, as required by said contract; that after deducting from the fifteen hundred tons required to be delivered under said contract, *first*, the two hundred and sixty tons whose delivery was waived by respondent, *second*, the eleven hundred and fifty-two tons admitted to have been delivered, and *third*, the two hundred and thirteen tons accepted as under the contract, the result will show that appellant had delivered all of the ice which it had contracted to sell.

The respondent replied, denying the allegations of the answer, and stating that, on the twentieth of April, appellant's machinery was out of repair, and it was agreed between the parties that the delivery of the ice should be postponed for ten days, not, however, thereby interfering with the quantity called for under the contract; that, at the expiration of these ten days, appellant's machinery was in condition to make ice, but not



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such as respondent was entitled to under his contract; wherefore for six days thereafter respondent, to accommodate the appellant, purchased ice at the rate of $1 a ton.

There was evidence tending to show that appellant made deliveries of ice under the aforesaid contract until April 20, when, by agreement, it ceased deliveries until May 12, when it again, by consent, ceased delivery until May 16. There was evidence tending to show that, after these suspensions, appellant delivered two hundred and thirteen tons of ice to respondent at the price of $1 per ton. The evidence was undisputed that appellant delivered eleven hundred and fifty-two tons and three hundred pounds of ice at $2.20 as prescribed in the contract. On July 7, 1892, appellant informed respondent that he considered his contract as about filled.

On the eighteenth of July appellant inclosed the following statement to respondent:

*Dear Sir:*—Below we hand you statement of ice shipped you, and also the basis upon which we consider our contract for one thousand five hundred tons with you as filled:

| | $1.00 | $2.20 | $3.50 |
|---|---|---|---|
| April 12—30 | 79.1200 | 99.800 | |
| May 1—15 | 135.100 | 147.1100 | |
| May 16—31 | 78.100 | 263.1550 | |
| June 1—15 | | 259.1050 | |
| June 16—30 | | 195.500 | |
| July 1—12 | | 61.1800 | 124.1900 |
| | 292.1400 | 1029.800 | 124.1900 |

On contract:

| | |
|---|---|
| $2.20 ice........ .................. | 1029.800 tons |
| 1.00 ice made so by stoppage of shipments................. | 213.200 tons. |
| 13 days' stoppage at 20 tons per day... | 260. tons. |
| | 1500.1000 tons.* |
| Ice shipped over and above contract... | 124.1900 tons. |

Yours truly,

CARONDELET ELECTRIC LIGHT & P. Co.,
Per F. W. MOTT, Secretary.

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The evidence showed that respondent paid for ice to be delivered under said contract the sum of $3,207.30; $725.50 of which was paid on June 22, 1892, and receipted for by appellant as "*on account of contract.*" There was testimony tending to show that at the time of the letter and statement of date July 18, 1892, *supra*, respondent called at appellant's office, when he was informed that his contract was filled, and he then offered $2.25, $2.50 and $2.75 per ton for ice, which offer was refused, and the company offered to let him have ice at $3 per ton, and this offer respondent declined. Upon the trial there was a judgment in favor of respondent, from which the defendant has appealed; and it assigns as error, *first*, that the court erred in giving improper instructions for the respondent, and refusing proper instructions asked by appellant; *second*, that the court erred in refusing to set aside the verdict as excessive.

The theory of appellant is, that it was entitled to deduct from the fifteen hundred tons of ice, which it had contracted to sell and deliver, two amounts, to-wit: two hundred and sixty tons which respondent consented not to receive, and two hundred and thirteen tons (at $1 per ton), which respondent received as under the contract, though at a reduced price. Each of these defenses was submitted to the jury under the following instructions given for appellants:

"1. If the jury believe from the evidence that by the mutual consent of the parties the delivery of ice between April 20 and May 1, 1892, and May 13 and May 16, 1892, was waived, the plaintiff cannot recover for the nondelivery of such ice as defendant could and would, under the contract, have delivered during the periods aforesaid. In order to establish the waiver as aforesaid, no formal proposition made by one party and accepted by the other need to be shown, but the

fact that delivery was waived by mutual consent may be inferred from the conduct, acts and declarations of the parties given in evidence, if such conduct, acts and declarations satisfy the jury that such waiver was mutually agreed upon between the parties.

"2. If the jury believe that the plaintiff waived the delivery of a certain quantity of ice in April and May, 1892, and also accepted ice at a reduced rate in lieu of contract ice, and if you find that the quantity of ice received at a reduced rate, the delivery of which was waived, and the quantity of ice added to eleven hundred and fifty-two tons, equals or exceeds fifteen hundred tons, then your verdict should be for the defendant.

"3. If the jury believe from the evidence that from May 1 to May 6, 1892, inclusive, and May 16 to May 18, 1892, inclusive, the plaintiff received two hundred and thirteen tons and two hundred pounds of ice at a reduced rate as and for the car loads to be delivered during the period aforesaid under the contract, then defendant is entitled to credit on the fifteen hundred tons for the ice so delivered."

The verdict of the jury on the questions of fact submitted in the foregoing instruction was supported by substantial evidence, and is, therefore, conclusive, unless there was reversible error committed by the court in the instructions given or refused.

After an examination of the instructions given and refused by the court, we do not think, under the evidence, that any prejudicial error was committed. Instruction number 1, given for respondent, was, as to the sufficiency of facts, stated to constitute waiver "*as to the time within which the contract for delivery of said ice was to be fulfilled.*" The undisputed evidence showed that, although the delivery of the ice, according to the terms of the contract, was to be made "*by or*

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*about the twentieth day of June, 1892*, yet, on the twenty-second day of June, 1892, appellant receipted for $727.50 "*on account of contract.*" If it be conceded that there was technical error in the instruction, in so far as it assumed the twentieth day of June to be the date of expiration of the contract, yet it was evidently a harmless one, because the time, *i. e.* twenty-second of June, 1892, when appellant receipted for the money, was at a period when the contract could have reasonably been held to be ended, unless something had been done indicating an intention to prolong its existence.

Under the evidence of the large payment then made, and the surplus of money then in appellant's hands, and the continued delivery (as shown by appellant's statement) of *contract ice* up to July 12, 1892, we cannot see how the jury could have been misled by the reference, in the instructions complained of, to June 20, 1892, as the date after which acts of waiver might be found by the jury.

Nor do we think the instruction was defective in requiring appellant to prove its defense of waiver. The execution of the contract sued on obligated appellant to deliver *all* the ice therein sold. Appellant could only *avoid* the effect of its contract by affirmative proof of the matter set up in avoidance. This is all that the instructions required, and, when considered with the instructions, *supra*, given for appellant, placed the question as favorably as the appellant could demand.

We have examined the other objections to the instructions herein. Our conclusion is that the case was fairly presented to the jury. We do not think, under the evidence, the verdict is excessive. The judgment herein is affirmed. Judges ROMBAUER and BIGGS concur in the result.

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ALFRED A. PAXSON, Respondent, v. ST. LOUIS DRAYAGE COMPANY *et al.*, Appellants.

**St. Louis Court of Appeals, December 19, 1893.**

1. **Practice, Appellate:** EXAMINATION OF VOLUMINOUS EVIDENCE. An appellant is not entitled to the examination of voluminous evidence by this court, when he himself makes no statement of it and lends no assistance thereto.

2. ———: DE MINIMIS NON CURAT LEX. A judgment will not be reversed for error in a trifling amount—in this cause $1.89.

*Appeal from the St. Louis City Circuit Court.*—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

*Henry B. Davis* for appellants.

*Alfred A. Paxson* for respondent.

BIGGS, J.—This is an action for damages for breach of the following contract:

"This agreement, made and entered into this thirteenth day of December, 1889, by and between the Batchelder Egg Case Company, of St. Louis, Missouri, party of the first part, and F. F. Henseler, general manager of the St. Louis Drayage Company, St. Louis, Missouri, party of the second party,

"*Witnesseth:* The said party of the second part agrees to do the draying and delivering of the goods of the said party of the first part from their store in St. Louis, Missouri, to the freight depots and to city customers in St. Louis at the following rates:

"Butter tubs, nested, per one hundred tubs, twenty-five cents.

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"Empty egg cases, per hundred cases, thirty-five cents.

"Filled egg cases, or cases of fillers, per one hundred cases, $1.

"K. D. cases, per one hundred pounds, two and one-half cents.

"Car lots from depots in St. Louis, and from store to depots in St. Louis, $6 per car. All freights going to East St. Louis to be collected from railroad company at East St. Louis, except to points below Cairo, Illinois, at tariff rates by the said party of the second part. Ample consideration to be paid by the party of the first part to parties of the second part for the drayage of creamery supplies of all kinds, inclusive of salt, etc., which cannot well be classified in this agreement.

"The said parties of the second part are to render unto the said parties of the first part at the end of each month an itemized statement or bill for the drayage done during the preceding month.

"It is further agreed and understood that this contract shall hold good for one year from the date first mentioned above.

"In witness whereof we have, this thirty-first day of December, 1890, set our hands and seals, and unto the duplicate thereof.

"(Signed) BATCHELDER EGG CASE Co.,
"E. E. Clark, Cashier.

"(Signed) ST. LOUIS DRAYAGE Co.,
"F. F. Henseler, G. M."

The breach alleged is that, from and after March 13, 1890, the defendant, the St. Louis Drayage Company, refused to haul the freight tendered by the Batchelder Egg Case Company, and that in consequence thereof the egg case company was compelled to, and did, expend a larger sum than the contract price would have

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amounted to for the services which appellant had agreed to perform. The cause of action growing out of the alleged breach was assigned to the plaintiff.

It is admitted by the drayage company that it failed and refused to perform the contract on and after March 13, 1890, and that the prices paid to other parties by the egg case company were as claimed, and were reasonable. The defendant, the drayage company, justified its refusal to proceed further with the contract upon the following grounds. *First.* The egg case company had in many instances fraudulently understated the weight of freight. *Second.* It had insisted that the defendant should haul single articles, such as butter tubs and egg cases, at the same rate as was agreed upon in the contract for the tubs "nested" per hundred tubs, etc. *Third.* It had refused to pay bills for freight, and that defendant was obliged to bring suit to collect them.

The case was sent to a referee, who took testimony and recommended a judgment in plaintiff's favor for $222. The defendants filed exceptions to the report of the referee, which the circuit court overruled. Thereupon the report was approved, and a judgment entered for the amount found to be due by the referee. The drayage company only has appealed.

It was undisputed that the appellant's bill for hauling freight during the month of January was promptly paid. The referee found that the bill for February and up to March 13, as presented by the appellant, was not warranted by the rate fixed in the contract, and that, therefore, the refusal of the egg case company to pay it constituted no valid excuse for the abandonment of the contract by the appellant.

The referee also found that the appellant had ample protection under the contract by weighing the goods delivered to it for transportation, and the fact

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that the egg case company had noted underweights on some of the goods was not a justification for the abandonment of the contract by the appellant.

Whether the facts found by the referee and his conclusion thereon are authorized by the evidence we can only know by an examination of the transcript. The briefs presented by the appellant fail to give any of the evidence; in fact, no reference is made to it. This is not a compliance with the rules of the court. The record is very voluminous, and it is unreasonable to ask us to go through it unaided by counsel. *McKensie v. Railroad*, 24 Mo. App. 392, 396; *Jayne v. Wine*, 98 Mo. 404.

It is contended by the appellants that it was not bound to carry separate or single articles, (which were contracted for in round numbers) at the contract rate. Conceding this point to be well taken, the evidence bearing on the question, as it appears from the respondent's abstract, shows that the recovery on this score was for only $1.89. We can not reverse the judgment for so trivial a sum. *De minimis non curat lex.*

Judge Bond, having been the referee in the case, does not participate in the decision. Judge Rombauer concurring, the judgment will be affirmed.

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MAURICE SHEEHAN, Appellant, v. T. J. PROSSER *et al.*, Respondents. 55 569 102 671

**St. Louis Court of Appeals, December 19, 1893.**

1. **Master and Servant:** NEGLIGENCE OF FELLOW SERVANT. While a building was in process of erection, lumber was hoisted to one of the upper floors by means of apparatus operated by steam power. *Held*, that one of the workmen, who received the lumber thus hoisted, and the engineer in charge of the engine by which the steam power was generated, were *prima facie* fellow servants within the rule making the negligence of a fellow servant a risk incident to the employment.

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2. ——— : ——— : PLEADING. The defense, that personal injuries sued for were caused by the negligence of a fellow servant of the plaintiff, is available in an action by a servant against his master without being specially pleaded.

*Appeal from the St. Louis City Circuit Court.*—HON. JACOB KLEIN, Judge.

AFFIRMED.

*Dodge & Mulvihill* for appellant.

(1) The defense of a fellow servant was not set up in the answer of defendant, and hence not applicable. The averment of contributory negligence is not sufficient to let in the defense that the injury was caused by a fellow servant. *Higgins v. Railroad*, 43 Mo. App. 548; *Conlin v. Railroad*, 36 Cal. 404; *Northrup v. Ins. Co.*, 47 Mo. 435; Deering's Law of Evidence, sec. 202; Revised Statutes, 1889, sec. 2049; *Newham v. Kenton*, 79 Mo. 382. It was a usurpation by the court of the province of the jury to withdraw the case from the consideration of the jury. *Ball v. City of Independence*, 41 Mo. App. 476. (2) Plaintiff was not a fellow servant of the foreman, Daze, or the engineer, Reed; as to plaintiff they were vice-principals, and defendants are liable. *Dutzi v. Geisel*, 23 Mo. App. 676; *Miller v. Railroad*, 109 Mo. 350; *Foster v. Railroad*, 21 S. W. Rep. 916; 2 Thompson on Negligence, sec. 521, p. 899; *Long v. Railroad*, 65 Mo. 225; *Parker v. Railroad*, 109 Mo. 362; *Dixon v. Railroad*, 109 Mo. 413.

*C. P. & J. D. Johnson* for respondents.

If there is evidence tending to show that appellant was injured by the negligence of anyone, it was by that of the engineer, the fellow servant of appellant, and

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for whose acts in that behalf the respondents are in nowise liable. *Moran v. Brown*, 27 Mo. App. 491; *Corbett v. Railroad*, 26 Mo. App. 629; *Higgins v. Railroad*, 104 Mo. 419; *Parker v. Railroad*, 109 Mo. 378. And to entitle appellant to hold respondents, or either of them, responsible for the negligent act of the engineer, it devolved upon him to show affirmatively that the engineer was not his fellow servant, but the vice-principal of the respondents. *McGowan v. Railroad*, 61 Mo. 532; *Marshall v. Schricker*, 63 Mo. 311; *Blessing v. Railroad*, 77 Mo. 413. Hence, it was not necessary to set up in the answer, as a defense, the fact that appellant was injured by the negligence of a fellow servant. Proof of that fact necessarily negatived the allegation in the petition, that appellant was injured through the negligence of respondents, and a denial of the allegation by the answer put the same in issue. *Greenway v. James*, 34 Mo. 328; *Hoffman v. Parry*, 23 Mo. App. 29; *Kersey v. Gasten*, 77 Mo. 647; Bliss on Code Pleadings, par. 352; *Northrup v. Mississippi*, 47 Mo. 647.

Biggs, J.—The defendant, Prosser, had the contract for the construction of a building for his codefendant, the Kelly-Goodfellow Shoe Company. The plaintiff was employed about the building as a day laborer. He was injured by being thrown from the third story of the house.

The petition stated substantially that, at the time the plaintiff received his injuries, he and his coemployees about the building were engaged in hoisting lumber to the third floor of the house by means of a derrick, with ropes and pulleys attached, and that the power was furnished by a steam engine; that the plaintiff, with three others, was on the top of the building, and that they were engaged in receiving the pieces of

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lumber which were lashed together with ropes and chains, and that while the plaintiff was thus engaged he was, by a sudden and unexpected movement of a load of lumber, struck and precipitated to the ground, thereby greatly injuring him. The liability of the defendants was based on their alleged negligence in requiring the plaintiff to work on the third floor of the building, and also on the alleged negligence of the engineer in wrongfully and suddenly starting up the engine, thereby causing the load of lumber to swing out and knock the plaintiff off the building. The answer contained a general denial, and also a plea of contributory negligence.

On the trial the plaintiff testified in his own behalf, and at the conclusion of his testimony his counsel, in answer to a question propounded by the court, announced that the plaintiff based his right of recovery *solely* on the negligence of the engineer. Counsel also announced that the other evidence, which they proposed to introduce, would merely corroborate and in nowise change the statements made by the plaintiff concerning the facts and circumstances attending the accident. Thereupon the court "ruled" (as the record reads) that the plaintiff under the law and evidence could not recover. This was tantamount to sustaining a demurrer to the plaintiff's evidence, and we will so treat it.

It was conceded by the plaintiff's counsel on the argument that no case was made against the Kelly-Goodfellow Shoe Company; but it is insisted that the court erred in sustaining the demurrer to the evidence as to Prosser.

A few extracts from the plaintiff's testimony concerning the engineer and his duties, and what took place at the time the plaintiff was hurt, will best illustrate the underlying facts of the case:

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"*Q.* Who was in charge of the engine? *A.* George Reed.

"*Q.* How long had he been in charge of it? *A.* Well, he had been there about two or three days, I think.

"*Q.* Do you know what his duties were? *A.* Yes, sir; to take care of the engine; that is all I know.

"*Q.* What did he do? *A.* Well, just hoist and lower the lumber.

*The Court:* "*Q.* Did he have anything to do with tying up the boards or adjusting the ropes to it? *A.* No, sir.

"*Q.* Or did he simply manage the engine? *A.* Managed the engine.

"*Q.* Fired up, and started it and stopped it? *A.* Yes, sir.

"*Q.* Whom did he work for? *A.* Well, he must have worked for the same man I did. * * *

"*Q.* Did you at any time give any orders or instructions to the engineer in regard to the manner or time in which he should hoist? *A.* No, sir; I did not.

"*Q.* Was that any part of your duty? *A.* No, sir.

"*Q.* You did not undertake to exercise it? *A.* No. * * *

"*Q.* Did anyone call to him? *A.* No.

"*Q.* No signal given to him? *A.* No signal at all.

"*Q.* Isn't it a fact that he saw the lumber go up, and, when he saw it go around out of sight, he lowered it to let it down? *A.* I suppose so.

"*Q.* That is the way it was done? *A.* I suppose it was; I didn't hear any one give any signals.

"*Q.* At no time? *A.* No time at all.

"*Q.* You never heard any of your companions there hallo to him to raise or lower away? *A.* No.

"*Q.* Things up to the time of the accident ran very smoothly; there was no hitch of any kind? *A.* There was none.

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"*Q*. Of your own knowledge do you know what made that pile of lumber move? *A*. Yes; the engine.

"*Q*. Did you see it? A. Well, I did not, but nothing else could move it.

"*Q*. That is your reasoning, or supposition, then? *A*. Well, there was no other power to move it.

"*Q*. You did not see the engine move? *A*. No; but the lumber moved.

"*Q*. And brushed you off? *A*. Yes.

*The court:* "*Q*. The sling had not been taken off the lumber yet, and it was still attached to the hoisting rope? *A*. Yes, sir."

Under the facts testified to by plaintiff *prima facie* he and the engineer were fellow servants. They were engaged in a common work, and were so situated that they could observe the conduct and delinquencies of each other and report to a common master for redress. If a different relationship existed, of which there is not a scintilla of evidence, it devolved on the plaintiff to show it. *McGowan v. Railroad*, 61 Mo. 528; *Blessing v. Railroad*, 77 Mo. 411.

The rule as to who are fellow servants is thus stated in *Moore v. Railroad*, 85 Mo. 594: "All are fellow servants, who are engaged in the prosecution of the same common work, leaving no dependence upon or relation to each other, except as colaborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them."

In the case of *Relyea v. Railroad*, 112 Mo. 86, the following statement of the rule was adopted: "They are coservants who are so related and associated in their work that they can observe and have an influence over each other's conduct and report delinquencies to a common correcting power." If either test is applied to the facts proven, the conclusion is unavoidable that the plaintiff and the engineer were fellow servants.

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As the evidence tends to show that the plaintiff was injured solely through the negligence of the engineer, it necessarily follows that there can be no recovery against the defendant, Prosser. It is useless to cite cases in support of the proposition, that the master can not be made to answer for injuries to one of his servants resulting from the negligence of a fellow servant.

The defense, that plaintiff was injured through the negligence of a fellow servant, was available to the defendants without having been specially pleaded. Proof of that fact necessarily disproved the averment that the plaintiff was injured through the negligence of the defendants. *Hoffman v. Parry*, 23 Mo. App. 20; *Northrup v. Ins. Co.*, 47 Mo. 435. The rule is that anything may be shown under a general denial, which tends to prove that the cause of action stated never existed. *Greenway v. James*, 34 Mo. 326; Bliss Code Pleading, par. 352.

The plaintiff relies on the decision of the Kansas City Court of Appeals in the case of *Higgins v. Railroad*, 43 Mo. App. 548, as establishing a contrary doctrine. The court there intimates and cites some authorities in support of the proposition, that such a defense ought to be specially pleaded. But the point is merely suggested and not decided.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It is so ordered.

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Anton Schmitz, Respondent, v. The St. Louis, Iron Mountain and Southern Railway Company, Appellant.

**St. Louis Court of Appeals, December 19, 1893.**

**Damages:** EVIDENCE OF LOSS OF EARNING CAPACITY. In an action by a father for damages for injuries to his minor child, whereby the child (a boy) was crippled, there was evidence tending to show that boys thus crippled could not find employment in a number of avocations, and that their earning capacity was therefore lost entirely, or nearly so. The defendant adduced no evidence of an earning capacity on the part of such a cripple in any avocation. *Held*, that there was sufficient proof of the plaintiff's damages in this regard.

*Appeal from the St. Louis City Circuit Court.*—Hon. J. A. Harrison, Special Judge.

Affirmed.

*H. S. Priest* and *H. G. Herbel* for appellant.

*Seneca N. Taylor* for respondent.

Rombauer, P. J.—The plaintiff recovered a verdict for $1,809 against the defendant for loss of services and outlays, occasioned to him on account of bodily injuries received by his minor son and servant through defendant's negligence. The son had his leg crushed while attempting, on the line of a public highway, to cross an opening left in one of defendant's trains, which stood athwart the highway. The case is the same which was before this court on a former appeal by plaintiff, reported in 46 Mo. App. 380. The recovery on the first trial was $2,610, of which the plaintiff remitted $150. We reversed the judgment on the ground that, under the instructions of the court the

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damages awarded were excessive, and indicated mistake or bias on the part of the jury. We also held that the instructions submitted to the jury an element of damage of which there was no substantial evidence, and that remittiturs in this class of cases, which change the defendant's right of appeal from the supreme court to this court, were not permissible.

The main error assigned now is the same as then, namely, that the evidence in the case shows no right of recovery, and that the court erred in submitting the cause to itself sitting as a jury. An examination of the record discloses the fact that the evidence at the last trial was substantially the same as on the preceding trial. We held on the former appeal that, under the last controlling decisions of the supreme court, the plaintiff was entitled to go to the jury. Such holding necessarily precludes a re-examination of the question, unless the supreme court since such holding has established a different rule. This is not the case. On the contrary, the supreme court has, since the cause was submitted on the present appeal, decided in an action instituted by the minor himself, upon a cause of action arising out of the same accident and supported by the same evidence, that the plaintiff had a right to go to the jury. *William Schmitz v. St. Louis, Iron Mountain and Southern Railroad Co.*, 24 S. W. Rep. 472.

Touching the complaints now made of the court's action on the instructions which bear on the cause of action and right of recovery, it will suffice to say that the instructions given and refused in this case were substantially the same as those given and refused in the case of William Schmitz, last referred to, with this exception, that certain instructions were given for the defendant in the case of William Schmitz, which, in the present case, were refused as asked, and given in a modified form. That the instructions as asked were



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erroneous, has been decided by the supreme court in the case last referred to; hence the defendant has no ground for complaint on that score. Under the view taken by the supreme court the modifications were strictly proper.

We must also hold that the defendant's last complaint is without foundation. That complaint is to the effect, that no evidence was adduced of the minor's earning capacity in his crippled condition; hence, the evidence lacked a substantial basis for the admeasurement of the plaintiff's damages. The plaintiff gave evidence tending to show that boys crippled as this boy was could find no employment in a number of avocations; hence their earning capacity was entirely gone, or nearly so. The defendant adduced no evidence tending to show an earning capacity of a cripple in any avocation. That the question of earning capacity is one that must, more or less, depend upon opinion, and is not subject to mathematical demonstration, is obvious. We think the plaintiff acquitted himself of the *onus* imposed upon him by the opinion of this court upon the former appeal. He made a *prima facie* case showing a total want of earning capacity in a number of the usual avocations open to boys. If there were others in which a crippled boy could earn fair wages, it was for the defendant to show that fact. It is a matter of universal experience of which courts may take judicial notice, that the services of a cripple in the ordinary avocations of life are less valuable than those of one whose body is sound. The case was tried by the court, and the verdict shows that allowances were made for loss of services resulting from the usual casualties affecting health and the continuance of life.

In view of the fact that the plaintiff's right of recovery stands on the boundary line, we do not deem the case one where the judgment should be affirmed

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with damages. The plaintiff's motion to that effect is denied. The judgment is affirmed without damages. All concur.

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STATE OF MISSOURI *ex rel.* CATHERINE M. SCHONHORST, Executrix of PHILIP SCHONHORST, Respondent, v. HENRY HENNING, Appellants.

**St. Louis Court of Appeals, December 19, 1893.**

**The Evidence** is considered, and is *held* to require the judgment rendered by the trial court.

*Appeal from the St. Louis City Circuit Court.*—HON. JAMES E. WITHROW, Judge.

AFFIRMED.

*Eber Peacock* for appellants.

*Laughlin, Wood & Tansey* for respondent.

ROMBAUER, P. J.—The appeal in this case was taken to the supreme court under the mistaken view that the suit involved the title to real estate, and that a state officer was a party therein. The supreme court ordered a transfer of the cause to this court, holding that this court had exclusive cognizance thereof, and that it had no jurisdiction therein.

These preliminary observations become necessary to determine the exact *status* of the parties now before us on this record. It would seem from some memoranda found in the papers that in January, 1892, an attempt was made in the supreme court to suggest the death of James Cullinane, one of the defendants, but as that court never had any jurisdiction of the cause, such suggestion in fact was not made to the proper

court. At the October term, 1892, the death of the relator Philip Schonhorst was suggested in this court, and at the March term, 1893, Catherine Schonhorst, his executrix, entered her appearance in the cause, and a summons was issued at her instance to bring in the defendant Henning, and William Cullinane, executor of the defendant James Cullinane. This was the first information conveyed to this court that James Cullinane was dead. No notice was taken as to the remaining defendant, J. P. Schulte, and, as he never was properly brought into this court on the revived action, the cause against him will have to be dismissed.

Proceeding to consider the merits of the appeal, we refer to the fact that the cause is the same which was heretofore before this court on a former appeal taken by the plaintiff's testator. (*State ex rel. v. Henning*, 26 Mo. App. 119). The action is one on an official bond of a constable against him and his sureties. The breach charged is the constable's failure to execute a writ of restitution in an unlawful detainer proceeding. The first trial of the cause resulted in a judgment for the defendants, which judgment we reversed, holding that upon the conceded facts the plaintiff was bound to recover. The judgment upon the last trial was in the plaintiff's favor, and the complaint made is that such judgment is erroneous on the conceded facts.

There is no pretense that the evidence upon the last trial was different from the evidence on the preceding trial, except in so far as the defendants offered some records in evidence, which their counsel now claims in his brief should have been admitted as evidence of *res judicata*. The records are not in the transcript, but their general effect is stated in a brief filed by counsel. But, even if such records were in the transcript, it would not change the result. No plea of former adjudication was made by the defendants, and

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the records would have been inadmissible, if such plea had been made, as they in no way bore on the plaintiff's right of recovery in *this* action. The judgment was, therefore, the only one which the court could have rendered.

It is ordered that the case be dismissed against J. P. Schulte, and that the judgment be affirmed against the other defendants. All the judges concur.

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EMELINE E. LOAN, Appellant, v. JUSTICE C. GREGG, Respondent.

**Kansas City Court of Appeals, November 20, 1893, and January 8, 1894.**

1. **Fixtures:** MIRROR NOT BUILT IN WALL. A mirror not set in the wall but put up after the building was finished so that its removal did not interfere with the wall is a chattel and not part of the freehold, and does not pass therewith.

2. ———: INTENTION: OTHER ELEMENTS: JURY QUESTION. Intention to make a chattel a permanent accession to a building is not alone sufficient, without adaptability and annexation, and all of these are matters for the consideration of the jury iu a proper case.

*Appeal from the Buchanan Circuit Court.*—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

*James F. Pitt* for appellant.

The testimony shows that the mirror was an overtop, a part of a mantel made according to special drawings; that it was designed alone for and built into this particular house. Every test of a fixture is present; adaptability, annexation, and intention to make a permanent accession. These are matters of fact for a

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jury, of which in this case there is not merely some evidence, but the clearest and most satisfactory proof. *Goodin v. Association*, 5 Mo. App. 294; *Cooke v. McNeil*, 49 Mo. App. 81; *Ward v. Kilpatrick* 85 N. Y. 413; *Thomas v. Davis*, 76 Mo. 72. It was error to take the case from the jury, and the cause should be reversed and remanded.

*Hall & Pike* for respondent.

(1) The mirror in suit was of ordinary form and not unusual size, was not set in the wall of the building, was put up after the building was finished, was not so attached to the building that its removal could interfere with or injure it. It formed no part of the building. It was a mere chattel, like any other piece of furniture. *McKeage v. Ins. Co.*, 81 N. Y. 38. (2) It is true that the intention with which a chattel is attached to a building is a material element for consideration in determining whether a chattel has become a fixture. This was so held by this court in the recent case of *Cooke v. McNeil*, 49 Mo. App. 81; but it is not the only element; there are other elements. *Roger et al. v. Crow et al.*, 40 Mo. 91; 8 American and English Encyclopedia of Law, 52; *Ward v. Kilpatrick*, 185 N. Y. 413.

SMITH, P. J.—This is an action of replevin to recover the possession of an "overtop mantel mirror," alleged to have been wrongfully taken by defendant from the plaintiff's dwelling house.

It appears from the abstract of the evidence that the house in question was built by H. E. Barnard, who sold it with all furniture in it to the defendant, and that the latter sold it to a Mr. Lindsay, who sold it to plaintiff. It seems further that the defendant continued

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to occupy the house after his sale, as a tenant. When he quit the house and removed therefrom he carried away the mirror in controversy.

The undisputed evidence proved that the mirror was not built in the wall nor did it form any part of it, nor was it put up until the wall over the mantel piece was finished. It was then placed on the mantel piece, its base resting thereon and its back resting against the wall of the room. It was not disclosed how the mirror was fastened. The defendant, who was called by the plaintiff to testify, stated that he thought there was a very slight fastening but was unable to state just in what manner it was fastened. It does not appear that the removal of the mirror caused any injury to the wall or any break in the moulding. The wall was papered everywhere except behind the mirror. Its removal exposed the bare wall behind where it stood. There was no sort of connection between the mantel and the mirror other than has been stated. This mirror was of the same style and finish as a pier mirror which was placed on the opposite side of the room facing it. It was testified to by the original owner of the house that he never intended to change the positions of the two mirrors. They were intended to match *each other*.

The court instructed the jury to find for the defendant, and it is this action of the court that is called in question by the plaintiff's appeal. As has been already stated, the mirror in suit was not set in the wall, but was put up after the building was finished. It was not so attached to the building that its removal would interfere with or injure it in any particular. It was no more than a bare chattel like any other piece of movable furniture that was not an appurtenance to the building.

The facts here shown are quite analogous to those in *McKeage v. Insurance Co.*, 81 N. Y. 38, and the rule there announced must dominate this case.

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It is true, as we held in *Cooke v. McNeil*, 49 Mo. App. 81, that the true intention with which a chattel is attached to a building is a material element for consideration in determining whether it has become a fixture; but it is not the only element. There are other elements. The element of intention alone without the presence and existence of other elements is not enough to transform a mere chattel into a fixture. It will not do to say that, because the owner of a house declares that he intends that a picture hung on the wall or a bureau or book case placed in a certain position in a room are to remain permanently where placed, that they thereby lose the quality of chattels and become fixtures and a part of the freehold. It is true that every test of a fixture—its present adaptability, annexation and intention to make it a permanent accession and that these are matters of fact for the consideration of a jury in a proper case. Two of these elements are wholly absent in this case. The mirror was no more adapted or annexed to the room or building than a book case or bureau that might have happened to have been placed in it under like circumstances.

This case bears not the slightest resemblance to that of *Ward v. Kilpatrick*, 85 N. Y. 413, for there the mirrors "were actually annexed to the building and were so annexed during the process of building as a part of that process. * * * They were fitted to the use and purpose for which they were designed; they formed part of the inside wall."

The mirror was no part of the freehold and for that reason the plaintiff acquired no title to the former by the purchase of the latter. It is clear to us that the plaintiff, on the evidence adduced by her, was not entitled to a submission of the case to the jury, and therefore the trial court did not err in its ruling, and so it results the judgment must be affirmed. All concur.

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## Z. T. McNown, Appellant, v. Wabash Railroad Company, Respondent.

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**Kansas City Court of Appeals, January 8, 1894.**

1. **Railroads:** SIGNALS AT CROSSING: NEGLIGENCE. A railroad company, when it fails to ring the bell or sound the whistle as the train approaches a highway crossing, violates the statute and is guilty of negligence.

2. ——: ——: CONTRIBUTORY NEGLIGENCE. In order to justify the court in taking a case from the jury and declare plaintiff negligent, as a matter of law, it should clearly and incontrovertibly appear that no other conclusion than that of plaintiff's negligence is fairly deducible from the evidence, giving him the benefit of every reasonable inference that may be drawn from it; and the evidence in that case does not justify the court in declaring plaintiff guilty of contributory negligence, ELLISON, J., *dissenting.*

3. ——: ——: ORDINARY CARE. A person on the highway approaching a railroad crossing is only required to use ordinary care, which does not mean that every possible precaution shall be adopted, but only that care and circumspection which should be expected of one of ordinary prudence.

*Appeal from the Carroll Circuit Court.*—HON. E. J. BROADUS, Judge.

REVERSED AND REMANDED.

*Virgil Conkling* for appellant.

(1) The demurrer to the evidence should not have been sustained. The negligence of defendant was conclusively proven, and the question of plaintiff's contributory negligence was clearly a matter for the jury to determine. The testimony of plaintiff, taken as a whole, does not show contributory negligence. At the most, it was only a doubtful case upon which sensible men might differ. It was therefore a question of fact

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for the jury, and to them should have been submitted. The court is authorized to pronounce certain conduct negligent only when no other construction may fairly and reasonably be placed upon it. *Petty v. Railroad*, 88 Mo. 306; *Keim v. Railroad*, 90 Mo. 314; *Wilkins v. Railroad*, 101 Mo. 93; *Dickson v. Railroad*, 104 Mo. 492; *Kenney v. Railroad*, 105 Mo. 271; *Bluedorn v. Railroad*, 19 S. W. Rep. (Mo.) 1106; *Dixon v. Railroad*, 19 S. W. Rep. (Mo.) 412; *Ramsey v. Railroad*, 20 S. W. Rep. 162; *Jennings v. Railroad*, 20 S. W. Rep. (Mo.) 490. (2) A person crossing a railroad has the right to assume that the statutory signals will be given, and to so act. *Petty v. Railroad, supra; Crumpley v. Railroad*, 19 S. W. Rep. (Mo.) 820; *Jennings v. Railroad, supra.*

*F. W. Lehmann* and *Geo. S. Grover* for respondent.

The plaintiff's own testimony clearly developed the fact that the accident was caused solely by his own negligence, in driving upon defendant's track without the looking or listening for approaching trains. In such a case it is the duty of the trial court to instruct the jury that, as a matter of law, the plaintiff cannot recover, even though the defendant was also negligent in failing to give the statutory signals. *Henze v. Railroad*, 71 Mo. 636; *Turner v. Railroad*, 74 Mo. 602; *Powell v. Railroad*, 76 Mo. 80; *Taylor v. Railroad*, 86 Mo. 457; *Yancey v. Railroad*, 93 Mo. 433; *Hudson v. Railroad*, 101 Mo. 13; *Boyd v. Railroad*, 105 Mo. 371; *Corcoran v. Railroad*, 105 Mo. 399; *Maxey v. Railroad*, —— Mo. ——; 20 S. W. Rep. (1893), p. 654; *Drake v. Railroad*, 51 Mo. App. 562; Mo. Legal News, Feb. 15, 1893, p. 257.

GILL, J.—The plaintiff sued the defendant for damages for negligently running one of its trains over

and killing his mare at a public road crossing at Norborne, Missouri. The negligence alleged was that defendant's servants in operating the train failed to ring the bill or sound the whistle as the crossing was approached, as is required by the statute, Revised Statutes, 1889, section 2608. The defense consisted of a general denial and a plea of contributory negligence. At the close of plaintiff's evidence the court, at the instance of the defendant, gave an instruction that the plaintiff could not recover. The plaintiff thereupon submitted to an involuntary nonsuit and brought the case here by appeal.

The court's action in admitting certain evidence as to contributory negligence not pleaded and thereafter allowing defendant to amend its answer so as to cover the objectionable evidence, we deem it unimportant to notice, since at all events we think the court erred in taking the case from the jury.

As already stated, the defense was two fold—a denial of negligence, coupled with a plea of contributory negligence, in that plaintiff carelessly and negligently drove his team onto the defendant's track without looking and listening for an approaching train. There was abundant testimony tending to prove the alleged negligence in running the train, in that the bell was not rung nor whistle sounded as the train approached the crossing. But the trial court seems to have sustained the demurrer to the evidence on the alleged ground that plaintiff was himself guilty of negligently driving onto the track of the railroad without looking and listening for passing trains.

The testimony is not at all clear in some respects, but from the abstract we understand the circumstances to have been about as follows: At Norborne the course of defendant's road is east and west, crossing this public road running north and south at right angles.

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On the north side of the Wabash right of way stands a mill and some other small buildings one of which seems to extend well out towards the tracks of the railroad. Now, the plaintiff's movements are thus told in his own language: "I am the plaintiff, live in Ray county and am engaged in farming. At about eleven o'clock A. M. January 27, 1891, I drove my team up to Stribling's Mill in the town of Norborne, drove the team to the north door and held them there headed west. While standing there a train went east over the Santa Fe. Immediately thereafter I got unloaded and started to drive over to the store. When I started to drive out I was informed that I had plenty of time to cross the Wabash track; that the next train would be a passenger and that it wasn't due for some little time yet. (The train that did the damage was an extra freight.) When I started from the mill door with my team, I drove west to the corner of the mill and then turned around the corner of the mill and went south to the southeast corner; I then turned the southeast corner of the mill and drove east, or a little north of east, turned around the electric light pole and then around the telegraph, making an easterly course like the letter 'S' and then turned south and drove on the Wabash track at the regular mill crossing. This road is a public road and the crossing is a public crossing and both are used by the public generally. The street crossing the Wabash track at this point is known as Elm street and runs north and south. At the time I started to drive across the track I had no indication whatever of a train approaching and heard no signals whatever. When a person is coming around the mill there is a grain house, and when a person is in a position to see up the track it obstructs the view. When I looked up the track there was nothing in sight at all. I looked up the track to see, and couldn't see

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anything. When I drove onto the Wabash track I suddenly discovered the train approaching and do not think it was more than two hundred and fifty feet away. I had just driven onto the dump and the horses had gotten their fore feet on the track, when I saw the train coming. I tried to save myself by jerking my team out of the way. I turned the team partially to one side, but the engine struck one of the team, a valuable brood mare which was worth $125 or more."

On cross-examination plaintiff was asked this question:

"'*Q*. When you turned south—we will assume that you were within twenty or twenty-five feet of the railroad—did you look up the track to see if the train was approaching? *A*. Don't suppose that I did.

"*Q*. When you started south with your team across the track did you look up that railroad track? *A*. No, sir; I don't suppose I did; I heard nothing to attract my attention.

"*Q*. Wasn't the road perfectly straight here for two miles? *A*. Yes, sir."

The witness further testified: "Had some conversation with Mr. Hess before I left the mill door. I asked him how soon there would be another train, and he said the next would be a passenger on the Wabash, but that it wasn't due for some little time yet and I would have plenty of time to get out. There is a grain house west of this mill, that extends out towards the Wabash railroad. I looked up the track as far as the building would permit me seeing and there was nothing in sight and I heard nothing. When I got to the southwest corner of the mill I could see only a short distance up the track, and when I got to that point I did not hear any noise like the ringing of a bell or the blowing of a whistle."

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Keller, another witness, among other things, stated: "It is about eighty feet from the mill to the railroad track. I didn't notice McNown until the train was right on him.

"*Q.* After McNown emerged from the mill, was there anything to prevent him from seeing up the track? *A.* I think there was some small building in the way on the north side of the track."

On this state of the evidence the trial court forced plaintiff to a nonsuit on the ground that his loss was the direct result of his own negligence, and, therefore, that he was in no condition to complain of the defendant's negligence. The announcement of the principles of law controlling this character of cases is often easier than their application to a given state of facts. The omission to do a thing in the time or manner as commanded by positive statute is negligence *per se.* Hence the defendant, when it failed to ring the bell or sound the whistle as the train approached the crossing in question, violated the statute and was guilty of negligence. On the other hand, if when the plaintiff approached the railroad crossing he failed to exercise that degree of care which an ordinarily prudent person would observe under the same or similar circumstances, then plaintiff will be deemed to have been likewise negligent, and for damages occasioned thereby he cannot recover.

Admitting now that defendant's train men were in the flagrant violation of the statute (which the testimony tends to prove); that they were running the train across this public highway without giving the statutory signals, then the plaintiff ought to recover for the killing of his mare, unless he, too, was negligent. This contributory negligence charged on the plaintiff is matter of defense that must be made out by the defendant, the *onus* rests on it. Such negligence, too, is ordinarily for the determination of the jury under

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proper instructions. The court is not authorized to interfere and declare such defense established, except on the clearest proof. *Bluedorn v. Railroad*, 108 Mo. 439.

"When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been determined by the jury. The inference to be drawn from the evidence must either be certain and incontrovertible or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair minded men may well differ." *Voelker v. Railroad*, 129 Ill. 552. In order to justify the court in taking the case from the jury and declare the plaintiff negligent, as matter of law, it should clearly and incontrovertibly appear that no other conclusion than that of the plaintiff's negligence is fairly deducible from the evidence, giving him the benefit of every reasonable inference that may be drawn from it. *Kenney v. Railroad*, 105 Mo. 270, and cases cited.

Now, while the evidence here may tend to prove the plaintiff wanting in that degree of care which he ought to have exercised in approaching the crossing, we yet fail to see in his conduct that clear case of contributory negligence which would justify the court in so declaring as matter of law.

This is not a case where the plaintiff failed altogether to observe the precaution of looking and listening as he was approaching the point of danger. He seems to have been on the alert, but owing to the location of the grain house or other small structures extending out towards the railroad was unable to see any great distance up the track until he got within twenty or twenty-five feet thereof. And within this

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space, and just as his horses had set their forefeet on the first rail, he looked west and discovered the approaching train at a distance of about two hundred and fifty feet. He says that he then made every effort to free himself and his team from the threatened peril by jerking them back; he turned the team partially to one side, but was unable to get one of the horses entirely out of the way of the moving train. It does not appear just how far the plaintiff's person had passed the obstruction on the north side of the track when he looked west and saw the coming train. It was apparently a very short distance, since it was only about twenty or twenty-five feet from this obstruction to the north side of the railroad track, and within this space stood the wagon and horses. It may be that if he had cast his eye westward when a few feet further north he would have been able to discover the engine in time to have averted the accident. But that he did not do so is not conclusive proof that he was negligent. Ordinary care does not mean that every possible precaution shall be adopted, and ordinary care was all that plaintiff was called on to exercise. The question is, did the plaintiff, under the circumstances, conduct himself with that care and circumspection which should be expected of one of ordinary prudence. If he did this, then it was all that was required in order to relieve himself of the imputation of contributory negligence. *Kenney v. Railroad*, 105 Mo. 288; *Jennings v. Railroad*, 112 Mo. 275; *Easley v. Railroad*, 113 Mo. 245; *Shaw v. Jewett, Rec'r*, 86 N. Y. 617; *Greany v. Railroad*, 101 N. Y. 424; *Plummer v. Railroad*, 73 Mo. 594; Bishop on Non-contract Law, sec. 143.

The circumstances, too, are to be considered along with the plaintiff's conduct in order to determine whether he was conducting himself as an ordinarily prudent person would. He left the mill on the north

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side of the railroad after being advised that there was no train yet due, that it would be some little time before a train would pass on the Wabash; and it seems that the train doing the damage was an extra freight passing unexpectedly. Besides, the plaintiff heard no train bells or whistle, and had a right then to assume that no train was coming. *Petty v. Railroad*, 88 Mo. 319. Taking these circumstances in connection with all the evidence in the case we think the question of contributory negligence was one for the jury and should have been submitted to it for determination.

The judgment, therefore, will be reversed and the cause remanded. SMITH, P. J., concurring; ELLISON, J., dissents.

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WILLIAM N. NICHOLSON, Respondent, v. ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Appellant.

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**Kansas City Court of Appeals, November 20, 1893, and January 8, 1894.**

1. **Railroads:** KILLING STOCK: NOTICE. An instruction, if a gate was left standing open for such length of time directly previous to the accident, the defendant knew, or could by the exercise of ordinary care have discovered, it in time to have closed it before stock killed passed through it, then the defendant is liable, is supported by the evidence in this case, as is also an instruction summarized in the opinion which was given for the defendant.

2. **Justices' Courts:** APPEAL: DEFECTIVE AFFIDAVIT: APPEARANCE. A defect in an affidavit for an appeal from a justice's court is waived by the general appearance of the appellee; and a proceeding to trial after making objection to the affidavit waives the objection.

*Appeal from the Jackson Circuit Court.*—HON. R. H. FIELD, Judge.

AFFIRMED.



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*Gardiner Lathrop* and *S. W. Moore* for appellant.

(1) What constitutes reasonable time for a railroad company to be charged with knowledge that a gate is open or a fence down, and to close the one and repair the other, is ordinarily a question for the jury. Where, however, the time is so short, as in this case, it has invariably been held, *as a matter of law*, that negligence cannot be imputed to the railroad company for failure to discover the open gate or broken fence. *Clark v. Railroad*, 62 Mich. 358; *Stephenson v. Railroad*, 34 Mich. 323; *Railroad v. Dickerson*, 27 Ill. 55; *Railroad v. Swearingen*, 47 Ill. 206; *Antisdel v. Railroad*, 26 Wis. 145; *Railroad v. Eder*, 45 Mich. 329; *Railroad v. Swearingen*, 33 Ill. 289; *Vinyard v. Railroad*, 80 Mo. 92; *Fitterling v. Railroad*, 79 Mo. 504; *Davis v. Railroad*, 19 Mo. App. 425; *Ridenore v. Railroad*, 81 Mo. 227; *Morrison v. Railroad*, 27 Mo. App. 418; *West v. Railroad*, 26 Mo. App. 344. (2) The primary obligation to keep a farm crossing gate closed rests upon the land owner. *Adams v. Railroad*, 49 American and English Railroad Cases, 579; *Bond v. Railroad*, 100 Ind. 301; *Railroad v. Williamson*, 23 American and English cases, 203; *Manwell v. Railroad*, 80 Iowa, 662; *Harrington v. Railroad*, 71 Mo. 384. As the affidavit filed by the plaintiff in the justice's court did not state, as required by section 6330, Revised Statutes, 1889, whether the appeal was taken from the merits or an order or judgment taxing costs, the circuit court acquired no jurisdiction of the cause, and the court erred in admitting any testimony. *Spencer v. Beasley*, 48 Mo. App. 97; *Whitehead v. Cole*, 49 Mo. 428.

*Porterfield & Pence* for respondent.

(1) The principle decided in *Clarke v. Railroad*, 62 Mich. 358, cited in appellant's brief, is entirely foreign

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to the case at bar. The facts in the case at bar bring it within the rule of *Davis v. Railroad*, 19 Mo. App. 425; *Morrison v. Railroad*, 27 Mo. App. 418; *West v. Railroad*, 26 Mo. App. 344. All of which are cited in appellant's brief. (2) The cases cited in appellant's brief on the primary obligations to keep a farm crossing gate closed resting upon the land owner, are not applicable to the case at bar, for the reason that our statute imposes the duty of keeping such gates closed, upon the railroad company. (3) Appellant makes a point in its brief upon an alleged defect in the affidavit of appeal from the justice's court. The record, however, shows that the defendant entered its appearance in writing in the circuit court, when the appeal was taken by the plaintiff to said court, and since the circuit court had jurisdiction of the cause, and, by the entry of appearance, gained jurisdiction of the defendant, it could not then complain of an irregularity or defect in the appeal of the plaintiff from the court of the justice of the peace to the circuit court. *Fitterling v. Railroad*, 79 Mo. 504; *Gant v. Railroad*, 79 Mo. 502; *Reddick v. Newburn*, 76 Mo. 423. The case of *Spencer v. Beasley*, 48 Mo. App. 97, cited on this point by appellant, does not decide the question at issue.

Smith, P. J.—This is an action commenced before a justice of the peace to recover damages, under the statute, for injuries to stock. There was a trial in the circuit court which resulted in judgment for the plaintiff, and from which defendant has appealed. The evidence tends to show that the defendant let a contract to McGee & Kahman to provide and place willow mats along the side of its track at a point where the waters of the Missouri river were eroding the alluvion formation underlying it. McGee & Kahman contracted with the Foleys to procure and deliver the willows to be

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used for the construction of the mats. These the latter purchased of one Maxwell, who, with plaintiff, owned adjoining lands through which the defendant's road runs. The lands are enclosed by a common fence. There was no partition fence between them. They pastured the lands so enclosed by agreement in common. There is a farm crossing over defendant's road on Maxwell's land. There is a gate at this point through which the crossing is approached. The Foleys, in hauling willows from where cut to the railroad track, passed through this gate. The gate was a sliding one. Five of the witnesses called by plaintiff, some of whom had been engaged in hauling the willows for the Foleys, testified that during the time the hauling was done through the gate that it was always standing open; that they found the gate standing open at half past five in the morning and half past six in the evening during the time the hauling was done. One of them saw it open as late as six o'clock on February 7, 1891, the night the plaintiff's stock were struck and injured by the defendant's cars. They never saw it shut at all until after the injury.

The defendant's section man saw the gate open at 5:30 o'clock the evening before the night the stock were injured, and told the willow haulers to shut it, but did not know whether they did so or not. One of the defendant's witnesses testified that the gate was closed by him at 5:30 o'clock on the evening before the stock was killed. Two of its witnesses testified that the gate was always closed when the willow cutters quit work in the evening.

The plaintiff's stock escaped through this gate from the common enclosure and strayed upon defendant's track when they were injured. There was no dispute but that the stock passed through the gate in question.

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The jury were instructed that, if they believed from the evidence that the gate was left standing open for such length of time directly previous to the accident that the defendant knew, or could, by the exercise of ordinary care, have discovered, this fact in time to have closed such gate before the time in question, then the defendant was liable.

The jury were further told, by an instruction for defendant that, if the gate was closed about six o'clock in the evening and that, during the night, some person not in the employ of defendant went through, leaving it open, and that, during the night plaintiff's horses escaped through it and were injured, the verdict should be for defendant.

These two instructions fairly declared the law of the case as applicable to the facts. That given for plaintiff was entirely proper on the facts which his evidence tended to establish. It left it for the jury, as was proper to do, to determine from the evidence whether the gate had been left open for such a length of time previous to the infliction of the injury to plaintiff's stock, that the defendant knew, or could have known, by the exercise of ordinary care, the fact, in time to have closed the gate and prevented the same. Thornton on Railroad Fences and Private Crossings, section 161. Whether the gate's being left open during the two weeks the Foleys were hauling the willows through it, or for a shorter time, raised the presumption of negligence against defendant and charged it with the knowledge that the gate was open, was a matter for the jury to decide. *Wait v. Railroad*, 74 Iowa, 207; *Perry v. Railroad*, 36 Iowa, 102. It was the duty of defendant to close the gate after gaining knowledge that it was open, no difference by whom left open. *Wait v. Railroad, supra; Aylesworth v. Railroad*, 30 Iowa, 459.

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There was no evidence that the land owner authorized the gate to be opened, or, if so, to be left open day and night. It may be fairly presumed that he assented to the passage of the Foleys' wagons through the gate while engaged in hauling willows, but there is no evidence that he assented or acquiesced in the leaving of it open after night, or that he knew that it was so habitually left open. Nor is there any evidence that plaintiff knew the gate was left open day or night, or that he assented thereto in any way.

The jury, no doubt, found, as they may have well done under the evidence and instructions, that the gate had been left open by the willow haulers on the evening before the plaintiff's stock were injured, and that it had been so left open continuously for two weeks, or more, prior thereto. They evidently did not credit the statement of the defendant's witnesses that the gate had been closed the evening before the injury. There was a sharp conflict in the testimony of the witnesses of plaintiff and those of defendant on this point. The jury must have given credence to that of the plaintiff's witnesses. This was a question for them to determine. The verdict of the jury was clearly for the right party.

The objection that the plaintiff's affidavit for the appeal from the judgment of the justice did not conform to the requirements of section 6330, Revised Statutes, was waived by the defendant's general appearance in the circuit court. It is true that it made an objection there to the jurisdiction of the court; but it did not stand on the objection, but, after making the same, proceeded to the trial of the case. This, we think, constituted a waiver of the objection.

The circuit court had, under the law, jurisdiction of the action without reference to the appeal, and the general appearance of defendant to the action and the proceeding to trial gave the circuit court the requisite

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jurisdiction of the parties. *Pearson v. Gillett*, 55 Mo. App. 312; *Welch v. Railroad*, 55 Mo. App. 599; *Sampson v. Thompson* (decided at the present term).

We have considered the other objections urged by defendant, but find the same destitute of merit.

The judgment will be affirmed. All concur.

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SIMON WELSH, Respondent, v. HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

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**Kansas City Court of Appeals, November 6, 1893, and January 8, 1894.**

1. **Justices' Courts:** APPEALS: DEFECTIVE AFFIDAVIT: WAIVER. Although the affidavit for appeal from a justice's court fail to state whether the appeal is from the merits or an order taxing costs, yet on the granting of the appeal by the justice and the filing of the papers in the clerk's office, the circuit court becomes possessed of the cause, and if the appellee proceeds without objection, the defect is waived, limiting *Whitehead v. Cole*, 49 Mo. 428.

2. **Railroads:** FENCING STATION GROUND. Whether a railroad company has placed its fence and cattle guards as near the head of its switch as is consistent with the safety of trainmen in switching trains at the station is a question for the jury under proper instructions.

*Appeal from the Macon Circuit Court.*—HON. ANDREW ELLISON, Judge.

AFFIRMED.

*Spencer & Mosman* and *Ben Eli Guthrie* for appellant.

(1) We contend that defendant's demurrer should have been given because there was not a scintilla of evidence to sustain the charge made in the petition that the cow came upon the track "at a point where the same passed through enclosed or cultivated fields." This part of plaintiff's case rests entirely on conjecture. *Henderson v. Railroad*, 36 Mo. App. 112; *Fitterling v.*

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*Railroad*, 79 Mo. 504, 509; *Hyde v. Railroad*, 110 Mo. 280; *Railroad v. Talbot*, 78 Ky. 621; *Smith v. Railroad*, 37 Mo. 295; *Callaghan v. Warren*, 40 Mo. 137; *Long v. Moon*, 107 Mo. 338, 339. (2) The demurrer should have been given because, by the uniform decisions of this court and of the supreme court of the state, railway companies are not liable under the double damage section for stock killed on depot grounds. *Robertson v. Railroad*, 64 Mo. 412; *Swearingen v. Railroad*, 64 Mo. 73; *Morris v. Railroad*, 79 Mo. 367; *Lloyd v. Railroad*, 49 Mo. 199; *Russell v. Railroad*, 83 Mo. 510; *McIntosh v. Railroad*, 36 Mo. App. 377. (3) The defendant having in good faith constructed its station at Lingo, was entitled to the presumption indulged in favor of every other citizen, that it had acted rightly and had not abused its discretion. *St. Louis v. Weber*, 44 Mo. 550, 551; *Cape Girardeau v. Riley*, 72 Mo. 224; *Corrigan v. Gage*, 68 Mo. 544; *Jennings v. Railroad*, 37 Mo. App. 653; *Pearson v. Railroad*, 33 Mo. App. 546; *Powell v. Railroad*, 76 Mo. 84; *O'Harra v. Railroad*, 95 Mo. 692. (4) It was error to refuse defendant's second and third instructions, as they correctly declared the law of the case. Plaintiff was not entitled to go to the jury on a theory entirely subversive of the cause of action stated in his petition. *Luckie v. Railroad*, 67 Mo. 245; *Clement v. Yeates*, 69 Mo. 625; *Hausberger v. Railroad*, 43 Mo. 196; Revised Statutes, 1889, sec. 6345. (5) It was error to give the plaintiff's first instruction. No such issue was presented in the pleadings. *Bray v. Seligman*, 75 Mo. 40; *Glass v. Gelvin*, 80 Mo. 297. (6) We deny that the framers of the statute ever intended, or that the letter or spirit of the statute gives to the owners of stock killed on depot grounds, double damages for failing to fence a track, when that failure arises from an error of judgment as to the extent of ground necessary to

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accommodate the public, or to properly accommodate the trains of defendant running over its road. *Graw v. Railroad*, 54 Mo. 240; *Spitler v. Young*, 63 Mo. 42; *Nenan v. Smith*, 50 Mo. 525. (7) It was error to give plaintiff's third instruction. There was no evidence upon which to base it. This was practically conceded by plaintiff by asking his first instruction. *Henderson v. Railroad, supra; Miller v. Railroad*, 47 Mo. App. 633.

*Bert D. Nortoni* for respondent.

(1) The justice of the peace had original jurisdiction of this cause. Revised Statutes, 1889, sec. 6122. Therefore the circuit court had no jurisdiction of the "subject-matter." *Green v. Costello*, 35 Mo. App. 127; *Whitehead v. Cole et al.*, 49 Mo. App. 429. (2) The circuit court having no jurisdiction of the "subject-matter," none could be acquired by consent in the circuit court. *Whitehead v. Cole et al., supra.* The paper purporting to be an affidavit for an appeal from the justice of the peace to the said circuit court, and was insufficient and fatally defective, in that "it failed to state whether such appeal is from the merits, or from an order or judgment taxing costs." Revised Statutes, 1889, sec. 6330. And an affidavit for an appeal from a justice of the peace which fails to state, "whether such appeal is from the merits, or from an order or judgment taxing costs," "is insufficient and is fatally defective and confers no jurisdiction on the circuit court to try the cause." *Spencer v. Beasley*, 48 Mo. App. 97; *Whitehead v. Cole et al., supra.*

Brief in reply for appellant.

(1) The statutes, from section 6330 to 6349, are solicitous in every way, not only that the right of appeal

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shall exist, but that every possible and conceivable opportunity for the exercise of it shall be left open. It seems from these sections that it must follow that the return of the justice depositing the papers with the circuit court gives that court its jurisdiction, and that it proceeds to make amendments and corrections therein as the parties may suggest. *Myers v. Woolfolk*, 3 Mo. 348. (2) On the preceding authorities and statutes it seems infallible that the affidavit is subject to amendment in the circuit court. If it is amendable there, it is not jurisdictional. *Hardin v. Lee*, 51 Mo. 245; *Hunt v. Loucks*, 38 Cal. 372; *Parmelee v. Hitchcock*, 12 Wend. 98; *Cooper v. Reynolds*, 10 Wall. 308; *O'Reilly v. Nicholson*, 45 Mo. 163; *Gray v. Bowels*, 74 Mo. 419; *State ex rel. v. Donegan*, 83 Mo. 374; *Yeoman v. Younger*, 83 Mo. 424; *Hughes Adm'r v. Hardesty*, 13 Bush, 364; *McIlwrath v. Hollander*, 73 Mo. 105; *Fields v. Maloney*, 78 Mo. 179. (3) It is just the difference between void and voidable. This is a common practice in other proceedings; an amendment to show jurisdictional fact not shown in statement as before justices, can be properly made out in the circuit court. *Fatham v. Ruter*, 31 Mo. App. 304; *Vaughn v. Railroad*, 17 Mo. App. 4; *Circuit v. Railroad*, 79 Mo. 328; *Dryden v. Smith*, 79 Mo. 525; *Rollin v. Railroad* 73 Mo. 619. (4) The statement required by the statute, showing whether the appeal is from the merits or from the costs, is purely *a matter of averment*, and not a jurisdictional fact. If from the taxation of costs, the above clause confers jurisdiction. The statement being only required to advise the court and opposite party of the nature of the case that is to be tried. 48 Mo. App. 49. If the reason for this statute is correctly stated, then it necessarily follows that the party in whose favor the provision is made may waive it. *Moore v. Railroad*, 51 Mo. App. 504. It is not possible to come to any other

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conclusion than that this statement in the affidavit is purely a matter of averment when section 6330 is considered in connection with section 6340. *Horstmeyer v. Conners*, 51 Mo. App. 397. (5) The spirit of our code is directly opposed to a party gaining any benefit from raising a point of this kind, for the first time in this court. *State v. Mackin*, 51 Mo. App. 300, 309; *Gideon v. Hughes*, 21 Mo. App. 528; *Pershing v. Canfield*, 70 Mo. 140; *Squires v. Chillicothe*, 89 Mo. 232; *State v. Knight*, 61 Mo. 373. Sections 6339 and 6340 in connection with sections 2098 and 2117, Revised Statutes, 1889. (6) We know of no reason why the failure to comply with a statute regulating the practice in justice courts should meet with a more rigorous punishment than is imposed for a similar violation of a statute regulating the practice in courts of general jurisdiction. *State v. Knight*, 61 Mo. 373; *Stearns v. Railroad*, 94 Mo. 321; *St. Louis B & C. v. Memphis, etc.*, 72 Mo. 664.

Ellison, J.—Plaintiff instituted his action against defendant before a justice of the peace wherein he complained that defendant's engines and cars had struck and killed his cow. He recovered before the justice, as well as in the circuit court, whence the case was taken on appeal from the justice.

Plaintiff's contention here is that the circuit court had not, and this court has not, jurisdiction of the cause, and that his judgment before the justice stands against defendant unaffected by any proceeding since. His point is based on the fact that defendant's affidavit for an appeal from the justice failed to state whether such appeal was from the merits, or from an order or judgment taxing costs, as required by section 6330, Revised Statutes, 1889. That by omitting this requirement of the statute, no jurisdiction of the subject-matter was conferred upon the circuit court. The question

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was not raised in the circuit court and has been urged here for the first time in the history of the cause. Plaintiff's position is supported by the case of *Whitehead v. Cole*, 49 Mo. App. 428. That decision is attacked by defendant, and we are now of the opinion that we went too far in the *Whitehead case* in declaring that the omission of the statement as to the appeal being from the merits or costs was fatal to the circuit court's jurisdiction of the cause. An affidavit omitting to state whether the appeal is from the merits or merely from an order taxing costs is a defective affidavit, but is, notwithstanding such omission, an affidavit; and as such, it may be amended. Revised Statutes, 1889, section 6340. If it may be amended it must be a thing of substance on which an amendment can operate, and will necessarily have an operative effect in taking the *cause* from the inferior court and placing it in the superior court. A justice of the peace might very properly refuse to allow an appeal unless the necessary statutory affidavit was filed; indeed, under sections 6328 and 6330, Revised Statutes, he ought not to allow it. But if he, notwithstanding the affidavit is defective, or if no affidavit at all is made, nevertheless does allow the appeal and sends the transcript and papers to the circuit court as required by statute, section 6337, that court obtains jurisdiction of the cause. See *State v. Cook*, 33 Mo. App. 57; *City of DeSoto v. Merciel*, 53 Mo. App. 61. This is the more clearly apparent from the terms of section 6339, wherein it is declared that: "Upon the return of the justice being filed in the clerk's office, the court *shall be possessed of the cause*, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the original summons or the service thereof, or on the trial, judgment or other proceedings of the justice or constable in relation to the cause."

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So, construing sections 6328, 6330 and 6340 together it amounts to this, that under the former no appeal should be allowed until the statutory affidavit substantially complying with the statute is filed with the justice, but if the appeal should, nevertheless, be allowed, without complying with the former sections, it shall not, under the terms of the last section, be dismissed, if the appellant will make and file a proper affidavit in the circuit court before the appellee's motion to dismiss is determined.

It necessarily follows from the foregoing considerations that the affidavit may be waived by the appellee. He may take action on account of the defect, if he so desires, and if the appellant fails or refuses to cure the defect, as permitted by the statute, he will be punished by the dismissal of his appeal. But if the appellee fails to exercise his right to demand a proper affidavit, it will not affect the jurisdiction of the circuit court over the subject-matter of the action.

II. The judgment that was rendered in the circuit court is then, the one upon which plaintiff must rely. A consideration of the record and arguments of counsel has satisfied us that that judgment should be affirmed. The evidence shows, or at least it can be so stated, in the light of the verdict of the jury, that the cow got upon the track outside the corporate limits of the town of Lingo. There is evidence tending to show that she got upon the track through a defective fence, or, at a point outside the limits of the town where there was no fence, but where there should have been. The latter theory was submitted to the jury in an instruction. But defendant contends that the track could not be fenced at this point. That the fence and cattle guard were as close to the head of the switch as could be consistent with the safety of the trainmen in switching and handling trains at the town of Lingo. This question was

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likewise submitted to the jury by such an instruction as was said to be proper in *Pearson v. Railroad*, 33 Mo. App. 543.

Defendant says that plaintiff's statement of his cause of action fixes the point where the cow went upon the track at a place where the track passes through enclosed or cultivated fields; and that there is no evidence to sustain this allegation. The allegation made by plaintiff is broader than defendant states it. The allegation is that the animal went upon the track "at a point where said railroad passes through, along or adjoining enclosed or cultivated fields, or *unenclosed lands*" where defendant had failed to erect lawful fences, cattle guards, etc. This is the language of the statute, section 2611, Revised Statutes, 1889. There was evidence tending to show that the cow went upon the track and was struck either inside the railroad fence, or, at a point outside of the fence which was beyond the limits of the town, and which need not have been left unfenced for the reasonable convenience of the railroad in handling its trains or transacting business with the public, at the adjoining station grounds.

The instructions refused for the defendant were properly refused. They, in effect, took from the jury the question as to the reasonable limit of the switch ground.

The judgment will be affirmed. All concur.

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William Page, Respondent, v. B. W. Culver, Appellant.

**Kansas City Court of Appeals, January 8, 1894.**

1. Administration: effect of sale of realty. An administrator's sale of real estate under the statute is equivalent to a sale by the heir.

2. **Reversion:** SALE OF LEASE: RENTS. The sale of the reversion carries with it, unless expressly reserved, all rents that may subsequently become due under a lease previously given, and the grantee may recover the same in his own name.

3. **Rents:** REVERSION: COMMON LAW: APPORTIONMENT. At common law, as rent followed the reversion, no apportionment would be made; but monthly, quarterly and annual rent would follow the land and belong to the owner at the time it accrued.

4. **Administration:** SALE OF REALTY: RENTS. An administrator's sale of land effectually carries the reversion with rent to accrue as an incident thereto, though it be part of the crop, and this, without reference to the condition of the crop as to maturity or immaturity at the time of the sale.

*Appeal from the Buchanan Circuit Court.*—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

*James W. Boyd* for appellant.

(1) The instruction given by the court on the part of the respondent, ordering the jury to find for the respondent, is erroneous. The court should have instructed the jury to find for the appellant. *McAllister v. Lawler*, 32 Mo. App. 91; *Oyster v. Oyster*, 32 Mo. App. 270–275; *Adams v. Leip*, 71 Mo. 597; *Jenkins v. McCoy*, 50 Mo. 348; *Harris v. Turner*, 46 Mo. 438; *Morgner v. Biggs*, 46 Mo. 65; *Baker v. McInturf*, 49 Mo. App. 505. (2) Without ownership or right of possession, respondent's action in trover and conversion cannot be maintained. To maintain his action he must establish the fact of general or special property in the corn. *Parker v. Blades*, 79 Mo. 88; *Southworth Co. v. Lamb*, 82 Mo. 242, 249. (3) The administrator's deed purports to convey only the right, title and interest in and to said land which the intestate had at the time of his death. That is all the administrator

could, by such an order and by such a deed, convey. Revised Statutes, 1889, sec. 171. (4) The administrator's deed does not purport or pretend to convey personal property. This corn crop was personal property and belonged to appellant. *Garth v. Caldwell*, 72 Mo. 622–627; *Baker v. McInturf*, *supra*.

*Thos. J. Porter* and *Ben. J. Woodson* for respondent.

(1) The authorities cited by appellant have no application to the facts of this case. *McAllister v. Lawler*, 32 Mo. App. 91, decides on the authority of *Adams v. Leip*, 71 Mo. 597, *Jenkins v. McCoy*, 50 Mo. 384, *Harris v. Turner*, 46 Mo. 438 and *Morgner v. Biggs*, 46 Mo. 65, that an action of replevin will not lie in favor of the owner of land for a crop grown on and severed from the soil by a person in actual possession. (2) This being an action against the appellant, who never was in possession of the land, did not plant, cultivate nor harvest the crop, for one-third of the corn raised by a tenant reserved for rent, differs widely in principle from the cases relied upon by appellant's counsel and falls within the principle announced in *Foot v. Overman*, 22 Ill. App. 181, which holds that a purchaser at an administrator's sale takes with the land the share of the crop grown on the land reserved for rent, and of *Culverhouse v. Worts*, 23 Mo. App. 419; *Hayden v. Burkemper*, 101 Mo. 644, 647; *Stevenson v. Hancock*, 72 Mo. 612. (3) The only right claimed by appellant to rent the land was that inherited by his wards from their father. They took the land charged with the ancestor's debts and occupy the same position as that of a landlord who rents his land subject to a mortgage. *Hetch v. Deteman*, 56 Iowa, 679; 1 Jones on Mortgages, secs. 697, 780, 1658; *Culverhouse v.*

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*Worts*, 32 Mo. App. 419. (4) But there is no controversy with the tenant. Whatever respondent's rights may have been against the tenant in possession and claiming the corn, the share of the crop agreed upon as rent for the use of the land followed the reversion, and the tenant could have been compelled to attorn to the purchaser. Revised Statutes, 1889, secs. 6373, 6397; *Culverhouse v. Worts, supra.*

Smith, P. J.—The plaintiff sued the defendant in trover and unlawful conversion to recover the value of five hundred bushels of corn.

It appears that one William Murrin died seized of the land upon which the corn in controversy was grown; that after his death and pending the administration of his estate the defendant was appointed guardian of his two minor children, and as such guardian he rented the land to several different tenants in several parcels, to be cultivated in corn during the cropping season of 1888.

On the seventeenth day of May, 1888, the probate court ordered a sale of the land for the payment of debts; on the sixth of August, 1888, the land was sold under the order by the administrator at which sale the plaintiff became the purchaser and in the same month paid the purchase price, at which time the corn was maturing on the land. It was shown the corn was not then completely matured. It was gathered in December and January following. The defendant who was thus in possession of the land by his tenants at the time of the sale by the administrator received and converted the rent corn to his own use. The plaintiff had judgment in the court below, and from which the defendant has appealed.

It is not disputed but that the proceedings instituted by the administrator of William Murrin, deceased,



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to sell real estate to pay debts, and the deed made in pursuance thereof, conveyed the title to the premises in question to the plaintiff, and the only question which we are obliged to decide is, whether said sale and conveyance carried the rents and gave the plaintiff the right thereto.

In Illinois it has been ruled that a sale by the administrator under the statute of that state is equivalent to a sale by the heir, the administrator being made by statute, in substance, the attorney in fact of the heir to make such sale. *Selb v. Montague*, 102 Ill. 446; *Foot v. Overman*, 22 Ill. App. 181. And we can discover no reason why our statute concerning the administration of the estate of deceased persons should not be construed so as to give it a similar effect. Accordingly we think the sale of the land by the administrator was equivalent to a sale made by the heir. And so the renting by the defendant in his capacity as guardian of the heirs may be regarded as a renting by the heirs themselves.

The general rule is that a sale of the reversion carries with it, unless expressly reserved in the conveyance, all rents under a lease previously given that may subsequently become due, and that the grantee may recover them in an action in his own name. *Foot v. Osterman*, 22 Ill. App. *supra*, and cases there cited.

At common law, as rent follows the reversion or ownership of the land, no apportionment would be made; but the monthly, quarterly or annual rent would follow the land and belong to the owner at the time it accrues. *Vaughn v. Lock*, 27 Mo. 290. This rule has not been changed by our statute, but, on the contrary, it finds recognition in the provisions thereof. Revised Statutes, secs. 6373, 6397, 6398.

Hence it follows that the sale of the land by the administrator to plaintiff passed to him all the title of

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the defendant's wards, including their share of the crops reserved for rent and without reference to the condition of the crops. It effectually conveyed to plaintiff the reversion with the rent to accrue as incident to it. *Culverhouse v. Worts*, 32 Mo. App. 419; *Hetch v. Deteman*, 56 Iowa, 679; Jones on Mortgages, secs. 697, 780, 1698. According to these rules it is manifest that the plaintiff was entitled to the rent corn, and, therefore, we are unable to find any fault with the action of the trial court in directing the jury to find for the plaintiff.

It results that the judgment of the circuit court must be affirmed. All concur.

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HENRY LANGKOP *et al.*, Respondents, v. THE MISSOURI PACIFIC RAILROAD COMPANY, Appellant.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Railroads:** DAMAGE BY STOCK: FENCE. The statute makes it the duty of a railroad to so fence its track that stock cannot enter upon its track or, being there, cannot escape on the adjoining fields and commit damage, and this applies to tenants as well as to owner of the fee.

2. ——: ——: CORNERING TRACTS Plaintiffs were tenants of a triangular piece of land adjoining defendant's right of way, which was in a common enclosure with a cornering eighty owned by them in fee, and a passage could not be effected from one tract to another without passing over another triangular piece belonging to another cornering tract, which latter triangular piece plaintiffs had enclosed in a lane connecting these two tracts, without the apparent consent of the owner, and so kept it enclosed for two years; *held* such owner at least acquiesced in the use of his land by plaintiffs, and defendant was not relieved of its duty to fence its track, and, failing to do so, is liable for damage done on the land owned by plaintiffs in fee, by hogs escaping from its right of way over the two triangular pieces.

*Appeal from the Cooper Circuit Court.*—HON. DARSEY W. SHACKELFORD, Judge.

AFFIRMED.

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*Wm. S. Shirk* for appellant.

(1) The demurrer to the evidence should have been sustained. Plaintiffs' land on which the crops were destroyed and damaged was not adjoining land to the railroad, nor next adjoining. Defendant was not bound to keep its fences in repair for the benefit of anyone except the adjoining owner. *Kelly v. Railroad*, 65 Mo. 172; *Smith v. Railroad*, 25 Mo. App. 113; *Ferris v. Railroad*, 30 Mo. App. 122; *Harrington v. Railroad*, 71 Mo. 384; *Johnson v. Railroad*, 80 Mo. 260; *Peddicord v. Railroad*, 80 Mo. 160. (2) The demurrer should have been sustained for the further reason that plaintiffs' own evidence shows that the hogs which damaged plaintiffs' crops could not have escaped from the triangular piece of Chelton's land, rented to plaintiffs, onto the land of Rodgers, and from Rodgers' land onto plaintiffs' land, except by the voluntary act of plaintiffs, in tearing down the fence between Chelton and Rodgers, and leaving a gap in their own fence between their land and Rodgers. See authorities to point 1. (3) It devolved upon plaintiffs to show that this fence was not a lawful fence, at the time they tore it down; and it also devolved upon them to show that they occupied and used the corner of Rodgers' land with his consent and permission. *Johnson v. Railroad*, 80 Mo. 621; *Smith v. Railroad*, 25 Mo. App. 113 or 115 and 116; *Ferris v. Railroad*, 30 Mo. App. 122 on 124. (4) The court erred in finding that the triangular piece of pasture land and the eighty acres belonging to plaintiff, on which the crops were damaged, were in one common enclosure. And its finding in this particular explains its action in giving defendant's declarations of law, and then finding against defendant. Because A. tears down the division fence between his farm and B.'s, he does not thereby make both farms, in the eye of the law, a common enclosure.

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*John R. Walker* for respondents.

(1) Plaintiffs were adjoining owners, and the duty of the defendant to fence, existed in their favor. (2) Even if it be conceded (which I deny), for the sake of argument, that the lands in sections 8 and 9 were not in a common enclosure; yet defendant is liable, and for this reason: The land in section 8 adjoins the defendant's right of way, and there was no fence, lawful or otherwise, between this land and the tract in section 9. Between these was the chute, lane or passage way. *Ferris v. Railroad,* 30 Mo. App. 122; *Smith v. Railroad,* 25 Mo. App. 113; *Peddicord v. Railroad,* 85 Mo. 160; *Johnson v. Railroad,* 80 Mo. 620. (3) It is the essence of technicality to contend that this connecting passage or chute was on Rodgers' land. The corner was removed, and this left the opening. Even if it be held that this passage was over Rodgers' land, and that the hogs inflicting the injury, in going through this passage, thus passed onto Rodgers' land, yet this would not defeat this action. This gap or passage having existed for two years, shows conclusively that Rodgers' west line of fence was not a lawful fence; because he had no fence at the north corner of his land, and had not had for two years. (4) The plaintiffs were guilty of no negligence in removing this corner and constructing this lane or chute.

Smith, P. J.—This is an action brought under section 2611, Revised Statutes, to recover damages for injuries to crops standing and growing on certain lands, owned and rented by plaintiffs, caused by hogs entering upon the same from the defendant's right of way through a defective fence. There was a trial and judgment for plaintiffs, to reverse which defendant appealed.

The facts which we think the evidence tends to prove will be better understood by reference to the following plat used at the trial and preserved in the record before us.

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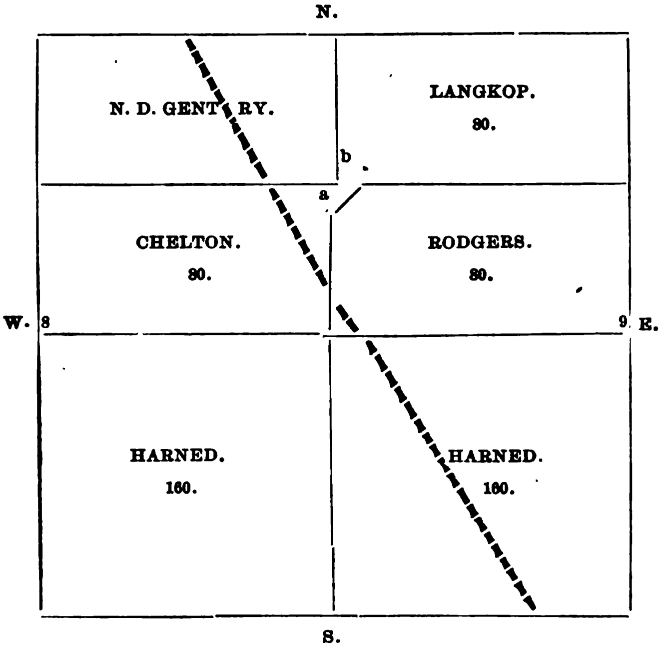


*a.* Two or three acres rented by Langkop of Chelton.

*b.* Gap made by Langkop from his eighty to the two and one-half acres rented from Chelton.

——. Railroad track.

———. Fences.

It is conceded that the railway fences along the sides of defendant's right of way where the same passes through the lands of the several proprietors, as designated on the plat, was defective and insufficient to turn stock.

It will be seen that the eighty acres of the land owned by the plaintiffs does not adjoin the defendant's right of way, but that the little triangular piece marked "a," which corners with that owned by plaintiffs and which is connected with it by the open, narrow lane "b," does so adjoin. The plaintiffs had occupied and

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used for this purpose for about two years the triangular piece under a lease from the owner, Chelton. The crops that were injured were on the eighty acres tract owned by the plaintiffs.

It further appears that the hogs of Mr. Harned, whose lands, it appears from the map, lie on each side of defendant's right of way, were in the habit of escaping from his enclosure through the defendant's defective fences upon its railroad, and from thence they strayed north along the same until plaintiff's triangular piece of land was reached, where, finding no obstructing railroad fence along there in their way, they strayed upon the same and from thence passed through the lane "a-b" and thus gained access to plaintiff's crops of corn and wheat which they destroyed.

Neither at the place where the hogs went upon the right of way nor where they left it to invade the grain fields of the plaintiffs was there a fence, as required by section 2611, R. S. It was the statutory duty of defendant to maintain lawful fences at both of these places. The paintiffs' damages were therefore occasioned by the defendant's neglect of duty.

But it is contended that since the land owned by plaintiffs, and on which the crops destroyed were standing, did not adjoin the defendant's railroad that the defendant did not owe them the duty to fence the same along there. The statute requires the railroads of this state to fence their tracks for two purposes; one to prevent stock from straying on the track, and the other to prevent stock from trespassing upon adjoining fields. *Silver v. Railroad*, 78 Mo. 528; *Stanley v. Railroad*, 84 Mo. 623. It is admitted that the plaintiffs were in the possession of the triangular piece of land as the tenants of the owner of the fee. Such being the fact, plaintiffs had such a proprietary interest in that piece of land as entitled them to the beneficial provis-

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ions of the statute in relation to railroad fences. Thornton on Railroad Fences and Private Crossings, sec. 49. *Brown v. Railroad*, 24 Q. B. (Can.) 350; *Brooks v. Railroad*, 13 Barb. 593.

But the defendant further insists that, even though the plaintiffs were the proprietors of the triangular piece adjoining its railroad, within the meaning of the statute, and that it was included in a common enclosure with the eighty acres tract in which the crops destroyed were situate, that still plaintiffs are not entitled to recover because the two tracts only cornered with each other and that an entry upon one from the other could not be effected without passing over a small part of the land of Rogers situate in the northwest corner thereof, for which the plaintiffs had no license or authority.

It seems that when plaintiffs rented the triangular piece of land they opened the narrow lane from it to their own land for the passage of their stock. It does not affirmatively appear whether the plaintiffs had the express permission of Rogers to enclose the small triangular piece of his land in the lane made by them or not. It does appear, however, that they did so and had used it for that purpose for nearly two years previous to the date of the injury complained of. By the opening of this lane the lands which plaintiffs owned and the piece they had rented were brought within one enclosure. Plaintiffs' lands so enclosed were made thus to adjoin the defendant's right of way.

Does the small piece of the Rodgers land extending into the narrow lane by which the plaintiffs' own land and that rented were connected and brought within a common enclosure extending to the defendant's railroad relieve defendant of the duty of maintaining a lawful fence along the side of its road adjoining the plaintiffs' fields? Even if the plaintiffs acquired the possession of the Rodgers land enclosed

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within the lane by disseizure in the first instance, yet from the length of time which the plaintiffs have used and occupied the same without objection of Rodgers, we may fairly deduce the inference that if Rodgers did not in the first instance grant plaintiffs a license to so use and occupy it that he at least acquiesced therein.

There is nothing in the evidence tending to show that there was any arrangement between the defendant and Chelton by which the former was excused from maintaining a lawful fence where defendant's road passes through his land.

Since the lands within plaintiffs' enclosure adjoined the defendant's railroad at the point where the trespassing hogs entered upon the same from the defendant's road, the plaintiffs were not strangers, but were, so far, adjoining proprietors who were within the protection of the statute; and for the reason the rule announced in *Berry v. Railroad*, 65 Mo. 172, and the cases that have followed it, are inapplicable.

We are unable to discover any ground of principle which would relieve the defendant from the performance of the duty of maintaining a lawful fence on the side of its railroad adjoining plaintiffs' fields.

We, therefore, find no fault with the action of the trial court in overruling the defendant's demurrer to the evidence, and so affirm the judgment. All concur.

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GEORGE VIERTEL, Plaintiff in Error, v. J. W. and B. F. SMITH, Defendants in Error.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Sales:** WARRANTY: RESCISSION: REASONABLE LIEN: JURY QUESTION. The vendee of a chattel on breach of warranty may rescind the contract and recover back the purchase price, yet he must act within a reasonable time, which is ordinarily a question for the jury; but where, as in this case, the delay is without excuse or fair explanation, the courts will as a matter of law declare the same unreasonable.

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*Error to the Cooper Circuit Court.*—HON. D. W. SHACKELFORD, Judge.

AFFIRMED.

*John Cosgrove* for plaintiff in error.

(1) The demurrer admitted everything which the evidence fairly tended to prove, but challenged its sufficiency in law. *Rine v. Railroad*, 32 Mo. App. 634; 2 Thompson on Trials, sec. 2267; *Jackson v. Ins. Co.*, 27 Mo. App. 62; *Rine v. Railroad*, 100 Mo. 228. (2) The plaintiff was entitled to a reasonable time in which to test the machine and to enable him to ascertain whether it complied with the warranty upon which it was sold. *Implement Co. v. Leonard*, 40 Mo. App. 477; *Werner v. O'Brien*, 40 Mo. App. 483; *Johnson et al. v. Agr. Co.*, 20 Mo. App. 100; *Harned v. Railroad*, 51 Mo. 482. (3) What is a "reasonable time," is, as a general rule, a question for the jury and must be determined from the peculiar facts of each case. Starke on Evidence [9 Am. Ed.] 769; 2 Thompson on Trials, secs. 1530, 1531, 1532, 1533, 1534; *Skeen v. Engine and Thresher Co.*, 34 Mo. App. 485; *Way v. Braley*, 44 Mo. App. 457; *Werner v. O'Brien*, 40 Mo. App. 483; *Tower v. Pauley*, 51 Mo. App. 75. (4) "Reasonable time" means as soon as circumstances permit, as soon as there has been an opportunity to ascertain whether the article sold possesses the qualities it was guaranteed to possess. Bishop on Contracts [Enlarged Edition]. sec. 680; 2 Thompson on Trials, sec. 1531; *Bell v. Railroad*, 6 Mo. App. 369; *McCormick, v. Basel*, 50 Iowa, 523. (5) The plaintiff had a right to rely on the letter of the warranty. He had a right to rescind as soon as he ascertained that the machine would not "do good work in all kinds of grain." *Bronson v. Turner*, 77 Mo. 495;

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*Werner v. O'Brien, supra; Leonard v. Implement Co.*, 40 Mo. App. 477.

*Draffen & Williams* for respondent.

(1) The plaintiff was not entitled to recover under the evidence submitted in this case, and the lower court properly so instructed the jury. The defendants did not warrant the machine for all future time, and did not engage with the plaintiff, that it would continue during all coming years to do good work. (2) It was evidently not intended by the parties, that the plaintiff should keep the machine for two years on trial before returning it, if found defective. The sale and warranty was on the fourteenth of September, 1889. A promissory note was given for the purchase price, to become due after the harvest of 1890. This would indicate the time that the parties intended for the trial of the machine. (3) The plaintiff was bound to make his election to rescind the contract and return the property within a reasonable time. What is a reasonable time, when the facts are admitted, and there is no dispute in regard to them, is a matter of law. *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100; *Tower v. Pauley*, 51 Mo. App. 75; 2 Thompson on Trials, section 1542; *Clark v. Wm. Deering & Co.*, 45 N. W. Rep. 456.

Gill, J.—On September 14, 1889, the plaintiff purchased from the defendants a Wood harvester and binder, and at the time defendants gave their written guarantee that the machine would "do good work in all kinds of grain." The plaintiff at the time of the purchase gave his note therefor in the sum of $120 due one year after date. When this note matured (September 14, 1890) plaintiff without objection paid the same to one Woolridge who had purchased it before maturity. In the fall of 1891, just two years after

purchase of the harvester and binder, plaintiff offered to return the machine to defendants for the alleged reason that it would not work well and demanded the return of the purchase money. Defendants refused, and this suit was brought. At the close of plaintiff's evidence the court sustained a demurrer to the testimony; plaintiff suffered an involuntary nonsuit and brings the case here by writ of error.

The question is, was the trial court justified, under the evidence, in declaring, as matter of law, that the plaintiff was not entitled to recover. In our opinion the court ruled correctly and its judgment must be affirmed.

The plaintiff bought this machine and took it to his farm in September, 1889, but he did not attempt a rescission of the contract and demand a return of the purchase money until September, 1891. The rule of law is well understood that, while the vendee of a chattel may on the breach of the warranty thereof rescind the contract and recover back the purchase price, yet the vendee must act with reasonable expedition; must within a reasonable time test the article, offer to restore the property and demand back his money. *Tower v. Pauly*, 51 Mo. App. 75; *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100.

As to what is a reasonable time in such cases is generally a question for the jury, or the trier of the facts; but, as in many other such cases, the time may be so long, and the delay in offering to rescind may be so entirely without excuse or fair explanation, that the courts will as matter of law declare the same unreasonable.

The time taken by the plaintiff, within which to test the machine in controversy, was, as we think, clearly unreasonable; the delay of two years was not explained by any fair consideration of the circum-

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stances shown by the testimony. The harvester was purchased in September, 1889, and while this was at the close of the harvesting season of that year and the plaintiff doubtless excused for not testing the machine that year, still he had ample time and opportunity during the season of 1890 for a thorough trial thereof. The plaintiff testified that he did use the harvester in cutting his own grain in the season of 1890 and that it worked satisfactorily, but he further says that his grain was light that season, and that he did not detect the fault in the machine until he used it in the heavy crop he raised in 1891. However, it does not appear but that there was heavy grain in the neighborhood during the season of 1890 where he might—without any inconvenience—have fully tested the machine.

The judgment was for the right party and will be affirmed. All concur.

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## ADOLPHUS RANSBERGER, Respondent, v. JOHN ING, Appellant.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Sales:** WARRANTY: COMMENDATIONS: INTENTION: JURY QUESTION. Mere assertions of the quality or condition of a chattel at the time of a sale is not, as matter of law, a warranty, but is merely evidence thereof as it may tend to show the intention of the parties, which is a question for the jury.

2. ———: ———: ADVERTISEMENT OF AUCTION. The statement in the posted notice of an auction sale that certain "shoats were in good health and condition," is not a warranty of their condition at the time of the sale; as a warranty, though called a collateral untertaking, yet forms a part of the contract by agreement of the parties at the time of sale.

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*Appeal from the Saline Circuit Court.*—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED.

*Leslie Orear*, *Boyd & Murrell* for appellant.

(1) It was error for the court to instruct, that the description of the property contained in the advertisement warranted its quality, and that the advertisement warranted the hogs to be sound on the day of the sale, (twenty-one days after the advertisement) although the evidence might show that the purchaser relied on such advertisement, unless it should be further shown by the evidence that the seller intended the advertisement to be a warranty, or knew that the buyer regarded it as such, or that it formed the basis of the contract. It was not contended on the trial in the circuit court that the advertisement was so intended by defendant, or so understood by plaintiff. *Engar v. Dawley*, 19 Atl. Rep. 478; Benjamin on Sales, 610. (2) The advertisement is no part of the conditions of sale, and does not bind the vendor, unless expressly made a part of the contract. 1 Lawson on Rights and Remedies, sec. 212; *Ashcom v. Smith*, 21 Am. Dec. 437; *Bartlett v. Hoppock*, 34 N. Y. 118; s. c., 88 Am. Dec. 428.

*R. B. Ruff*, *Jas. Cooney* and *L. W. Scott* for respondent.

GILL, J.—This is an action for damages on an alleged warranty in the sale of certain young hogs, sold by defendant to plaintiff, December 10, 1891. The evidence discloses about the following state of fact: Defendant Ing, when about moving from his farm in Saline county, on November 20, 1891, posted

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certain printed handbills in the neighborhood advertising a public sale on the premises of a lot of stock and farming implements, and among these the bills named "*forty-five head of shoats, all in good health and condition.*" The sale was advertised to come off on December 3, but was postponed by another notice to the tenth day of December. The plaintiff saw and read the bills and appeared at the sale and there bought the shoats. Subsequently a large part of the hogs died with the disease commonly known as "hog cholera." There was evidence tending to prove that the hogs were diseased at the date of the sale, and there was likewise testimony tending to prove the contrary. Plaintiff testified that when the hogs were put up for sale, defendant Ing told the auctioneer, "to make the announcement that the hogs were sound and all right," and that it was so stated. In this the plaintiff was corroborated by other witnesses. On the other hand, the auctioneer and other witnesses for the defense, swore that he only stated that "they were a nice lot of shoats; that he thought they were healthy and that they would show for themselves," etc.

The case was submitted to the court, sitting as a jury, on the following declaration of law, given at the plaintiff's instance: "That, if the court sitting as aforesaid believes from the evidence that defendant had a public sale of personal property on the tenth day of December, 1891, and that he advertised the same by printed handbills describing the property to be sold; when and where it was to be sold, and afterwards postponed said sale to the tenth of December, 1891, and that in said printed handbills was advertised to be sold with other property forty-five shoats and that said handbills contained the statement of and concerning said shoats, that all were in good health and condition; then said statement of and concerning said shoats

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was a warranty that all of said shoats were at the time of their sale free from all disease; and, if the court shall further believe from the evidence that plaintiff saw and read said handbills and said statement of and concerning said shoats, and attended said sale and purchased said shoats relying upon the statement aforesaid contained in defendant's sale bills as to the health and condition of said shoats, and that at the time of said purchase, said shoats or any of them were diseased or in any manner affected with disease, which was afterwards the cause of any of them dying, then plaintiff is entitled to recover in this suit damages for all of said shoats that died from said disease."

There was a finding and judgment for the plaintiff and defendant appealed.

From the foregoing instruction it appears that the case was tried on a misconception of the law, and for that reason the judgment must be reversed. The theory embodied in this declaration by the court is, that where the vendor in an auction sale shall in the antecedent printed notice state the quality of the chattel, then such statement shall be deemed a warranty to those purchasing at the sale, thereafter made, regardless of what may be said by the vendor at the time of such sale.

This is not the law. In the first place the court is not justified in declaring that a mere assertion of quality or condition of a chattel at the time of sale is, as matter of law, a warranty. It may be regarded as evidence tending to establish a warranty, but can hardly be denominated such as matter of law. The question is, as in other cases of contract, what was the *intention* of the parties. "This intention is a question of fact for the jury, to be inferred from the nature of the sale and the circumstances of the particular case. Benjamin on Sales, sec. 613. The important and difficult

question is, many times, to determine whether the vendor means to state a *fact* upon which the vendee shall rely, or intends merely to give his opinion, or express his judgment as to the condition or quality of the thing sold. The first may be a warranty; the second is not.

The instruction has, however, a more serious vice than the one just noticed. It declared that because the handbills, posted by the defendant some three weeks prior to the sale, contained the statement that said "forty-five shoats were in good health and condition," then such statement was a warranty that said hogs were at the time of their sale free from disease. This was manifestly erroneous. A warranty, though called a collateral undertaking, yet forms a *part of the contract* by agreement of the parties. "It follows, therefore, that antecedent representations, made by the vendor as an *inducement* to the buyer, but not forming part of the contract when concluded, are not warranties." Benjamin on Sales, sec. 610.

Now this handbill, advertising a future sale of defendant's hogs, could, at most, only amount to an antecedent representation of the quality and condition of the shoats as they were when the bills were circulated; and this statement could not be construed as any part of the contract subsequently entered into between plaintiff and defendant, unless expressly made so at the time of sale. 1 Lawson on Rights and Remedies, sec. 212; *Ashcom v. Smith*, 2 Penr. & Watts (Pa.), 211; Riddle on Warranty in Sale of Chattels, sec. 37–39.

The office of such advertisement is simply to *induce* the buyer to attend the future sale, and any representation as to quality of the goods to be sold contained in the published notice, will not be considered



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as a part of the contract, unless imported into the sale at the auction. The test is, what was the contract between the vendor and vendee *at the time of the sale.* Were the goods then sold with or without a warranty as to quality.

Now as to whether or not there was a warranty of the hogs when they were actually sold at auction, the evidence is conflicting,—that of the plaintiff tending to prove an intention, on defendant's part, to warrant the shoats to be free from disease, while that of the defendant tended to prove the contrary. That conflict must be settled by the triers of the facts.

The judgment must be reversed and the cause remanded for a new trial. All concur.

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## Ellis R. Smith, Respondent, v. Western Union Telegraph Company, Appellant.

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**Kansas City Court of Appeals, January 8, 1894.**

**Trial Practice:** ATTORNEY'S CLOSING ARGUMENT. In an action for delay in sending a telegram, the sole question submitted to the jury was whether the preoccupied condition of the wires was the cause of the delay, the plaintiff's counsel in his closing argument told the jury he was an operator and had worked on the line in question and it was all nonsense to say that any office could not be reached in twenty minutes. Defendant's counsel objected and called the court's attention to the matter and excepted because the court made no ruling but permitted the plaintiff's counsel to proceed with further matter of the same kind. At the close of the argument defendant's counsel further objected and asked that the jury be discharged and the cause continued. The court thereupon told the jury not to consider statements of counsel concerning his personal knowledge as an operator, as he was not a witness in the cause; and defendant again excepted. *Held,* the conduct of the plaintiff's counsel was prejudicial to the defendant and the direction of the court to the jury was insufficient to cure the same and the judgment should be reversed and a new trial granted.

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*Appeal from the Pettis Circuit Court.*—Hon. Richard Field, Judge.

Reversed and remanded.

*Charles E. Yeater* for appellant.

The action of plaintiff's counsel in the closing argument, in stating to the jury that he knew from his previous personal knowledge and experience as a telegraph operator, that the defendant's employees had not testified to the truth in their statement of their inability to call another office, and in persisting in similar remarks, was under all the circumstances of the case, such improper conduct as rendered it error to submit the case to the jury. *Fathman v. Tumilty*, 34 Mo. App. 241; *Gibson v. Zeibig*, 24 Mo. App. 69 and cases cited in opinion on rehearing; *Nichols & Shepard v. Metzger*, 43 Mo. App. 618.

*Geo. F. Longan* for respondent.

Gill, J.—This is an action to recover the penalty provided for in section 2725, Revised Statutes, 1889, for the alleged failure to promptly transmit a telegraphic dispatch left with the defendant's agent at Concordia, Missouri, at about six o'clock p. m., January 15, 1893. The message was directed to Elliott, at Marshall, Missouri, and, on account of some delay, was not received at Marshall until about nine o'clock on the morning of January 16, 1893. By reason of the absence of a direct wire from Concordia to Marshall, it seems to have been necessary to pass the message through the telegraph office at Lexington, Missouri. The defense relied on was, that the lines were so taxed with other telegraphic work that the operators were unable,

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during the ordinary business hours, to get the dispatch through as promptly as desired. This was indeed the sole issue in the case, and the court, without objection, presented the same by these instructions:

"1. The court instructs the jury that, if they believe from the evidence, that the defendant's agents were unable to send the message in question to Marshal before the close of the office hours at that place on the evening of January 15, 1890, because of the fact that the wires were busy or engaged, then their finding must be for the defendant.

"2. The court instructs the jury that, if they believe that it was impossible to send the message on the evening of the day it was filed, by reason of the fact that the wires were busy, or engaged, their finding must be for the defendant, although its agents may have failed to promptly send the message from Lexington to Marshall on the day following:

"3. The court instructs the jury that, if they believe from the evidence, that the defendant's agents attempted in good faith and impartially to promptly send the plaintiff's message, then, notwithstanding any failure, the finding must be for the defendant."

After an oral argument, by Mr. Longan, attorney for plaintiff, and Mr. Yeater, for defendant, the jury gave a verdict for the plaintiff, and from a judgment thereon defendant has appealed.

The principal matter complained of in this appeal is the alleged improper conduct of plaintiff's counsel in the discussion of the case before the jury. The bill of exceptions shows that Mr. Longan in making the closing argument to the jury, made use of the following words, and others of like import, as shown in the bill of exceptions which we copy, to-wit:

"'Gentlemen, I am a telegraph operator myself, and it is all nonsense to say that any office could not

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be reached at any time in twenty minutes after it is called.' And upon making said remarks in the course of the argument, defendant's counsel momentarily interrupted plaintiff's counsel, the said George F. Longan, and objected to such remarks, and to other remarks of a similar nature which had preceded them. The court at that time made no ruling, to which action of the court the defendant by its counsel then and there excepted at the time.

"Thereafter the said counsel for plaintiff, George F. Longan, resumed his argument, and very shortly thereafter he made use of the following language: 'I have worked on this very Lexington branch line myself, not at Concordia, but at Hughesville, and I know that that line is never kept busy, and that it has two wires which are more than sufficient to attend to business on that line. I know that any office on that line can be called without any delay, and it is all nonsense to tell me that the operator could not get that message off without delay.' And the said plaintiff's counsel repeated said remarks, or words to that effect in his argument to the jury, and while plaintiff's counsel, said George F. Longan, was continuing his argument, and immediately after the aforesaid objections the defendant's counsel, Mr. Charles E. Yeater, at the time wrote at once the following words upon a sheet of legal cap paper, to-wit: 'The defendant's counsel asks the court to reprimand Mr. Longan, counsel for the plaintiff, for stating to the jury in argument: "Gentlemen, I am a telegraph operator myself and it is all nonsense to say that any office could not be raised at any time in twenty minutes after it is called," and other similar statements, for the reason that his statement, as an expert, was not under oath.'

"And immediately after Mr. Longan concluded his argument defendant's counsel handed the said writing,

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setting forth the foregoing words, to the court, and in addition renewed his objections orally.

"And, thereupon, the court used about the following words to the jury: 'You will not consider any statements made by Mr. Longan in his argument concerning his personal knowledge as an operator, for the reason that he was not a witness in the cause.' To which action of the court in not more severely reprimanding Mr. Longan, or in not then and there discharging the jury and continuing the cause, the defendant then and there excepted at the time. And the said writing handed to the court last aforesaid set forth was then an there duly filed in the cause by defendant's counsel."

That plaintiff's counsel in this case grossly transcended the line of legitimate argument cannot be questioned. Notwithstanding frequent criticisms—many of which I think unjust—the settlement of disputes by means of trials by jury may be regarded as superior to all other experiments, hedged about and guarded as such trials are under our laws and rules of practice. And whether disputed facts are to be settled by twelve men or one man, there is nothing at the trial so conducive to a just result, or of such potent aid to the human understanding, as the well directed argument of the lawyer, who brings into the court the results of an industrious, thoughtful consideration of the case in all its bearings. But it is not the province of the lawyer in presenting by argument his client's cause to manufacture evidence. The testimony must come from the sworn witnesses.

It was herein that plaintiff's honored and reputable counsel was at serious fault when he indulged in the line of argument above quoted from; and it was the more serious and prejudicial to the opposite side *because* of the well known standing of the lawyer that

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uttered the objectionable matter. The probable prejudicial effect of Mr. Longan's voluntary and unsworn statements is readily seen when we consider what was in fact the telling point in the case and the state of the testimony bearing thereon. The sole question of fact then being tried by the jury, was, whether or not the delay in transmitting plaintiff's dispatch was unavoidable under the circumstances—whether or not the telegraph wires were so preöccupied that the operators were unable to forward the message in due season. The testimony adduced by the telegraph company tended very strongly to sustain this defense; indeed we may say that up to the argument there was but little evidence the other way. There were, however, some "physical facts" and circumstances tending to disprove the defense, and these the plaintiff was entitled to, and his counsel was justified in using these to the best possible advantage. He had the right, and it was his duty, to call attention to these circumstances, to elaborate thereon, to discuss the testimony given by defendant's witnesses and urge its improbability or falsity. But the attorney had no right, in the absence of direct proof on his side to supply the deficiency by his own unsworn statements. He exceeded the most liberal limit allowed to advocacy, when he said to the jury: "Gentlemen I am a telegraph operator myself, and it is all nonsense to say that any office could not be reached at any time in twenty minutes after it is called." And the counsel emphasized and aggravated the offense, when (though called to order by defendant's attorney) he in effect repeated such language, telling the jury, later on, "I have worked on this very Lexington branch line myself, not at Concordia, but at Hughesville, and I *know* that that line is never kept busy, and that it has two wires, which are more than sufficient to attend to business on that line. I *know*

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that any office on that line can be called without any delay, and it is all nonsense to tell me that the operator could not get that message off without delay." These, and like statements, the bill of exceptions recites, were made and *repeated* during the closing argument of the zealous counsel for the plaintiff—were made, too, at a time when defendant's counsel had no opportunity to reply, and in face of an objection interposed by him. The trial judge, though appealed to at the first appearence of the offense, said nothing, and permitted the attorney to proceed without rebuke and again to repeat the same unfair argument. However at the close of the speech the judge did say to the jury: "You will not consider any statements made by Mr. Longan in his argument concerning his personal knowledge as an operator, for the reason that he was not a witness in the cause." Defendant's counsel suggested that the rebuke or reprimand was not sufficient, and insisted that the jury should have been discharged and the the cause continued.

Now, the further question is, whether or not the above remarks by the trial judge after the close of the argument cured the prejudice thus wrongly cast against the defense. Ordinarily, we think an instruction to this effect might be sufficient; but in so aggravated a case as this we hold that this mild statement from the court was not adequate or timely. As to what is proper, in cases of this nature, depends much upon the circumstances. Here was the trial of a question where there appeared a decided preponderance of direct testimony on defendant's side of the issue. To overcome this, the plaintiff's overzealous counsel threw into the scales the assertion of his own experience, and repeated and elaborated the same before the jury. Doubtless this was done inadvertently and during the heat of earnest argument—at least from our own knowledge of the

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character and standing of the offending counsel we are free to concede that no unfair advantage or unprofessional conduct was *intended*. But this must not weigh "one feather's weight" with us. If, because of this indiscreet and improper argument, the conclusion is irresistible that the cause of the defendant was prejudiced, it is then our duty, in promoting the fair and impartial administration of justice, to order the judgment set aside and award the parties a new trial. We recognize that we are here dealing with a matter of practice that rests largely in the discretion of the lower court; but even in cases of that nature it is our duty to interfere where that discretion has been manifestly abused. We regard this as an instance of that nature.

Where illegitimate argument is indulged in before a jury it is made the duty of opposing counsel promptly to object at the time of its utterance, so that the court may immediately correct the error by rebuking the offending lawyer and admonishing the jury not to be influenced by the objectionable matter; and the reports of this and the supreme court are full of cases where the offended and prejudiced party was not heard to complain because of a failure to thus promptly object at the time. Where now, as was the case here, the opposing counsel does promptly make his objections to the unfair and improper argument—and that, too, in its very incipiency—was it not as well the duty of the trial judge as promptly to stop and reprimand the offending advocate and caution the jury not to be influenced by such prejudicial statements? In allowing Mr. Longan to proceed over defendant's objection, and to restate and elaborate his experience in telegraphy, the court tacitly indorsed the propriety of such argument; which thereby, we have a right to assume, became so fixed that even the mild caution given by the court at the

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conclusion of the argument would hardly eradicate it from the minds of the jurors. In our opinion then the error of the trial judge in permitting plaintiff's counsel, against the objection of the defendant, to indulge in said illegitimate argument, was not cured by the subsequent direction to disregard said statements. The remarks of Judge LEWIS, of the St. Louis court of appeals, in the decision of a case like this in principle we think, are applicable here. In that case the fault of the attorney was in discussing, against the objections of the other side, certain proffered evidence before the jury which had been excluded by the trial court. The court allowed the argument to proceed, but subsequently instructed the jury to disregard it. The learned judge who wrote the opinion said: "Nothing can be clearer than that, in this case, the plaintiff was entitled to be protected against any determination of his rights founded on the rejected evidence. The method adopted by the court was anything but a proper exercise of its authority to the end proposed. It is always dangerous to let in an evil, because of a possible remedy for it. Better to withhold the poison than to depend on the antidote. Instead of this mild attempt to avert the evil tendencies of the attorney's violation of propriety, the learned judge should have acted upon the rule declared on a former occasion; 'an advocate must not make himself a witness and state facts not in evidence to prejudice the jury. Such statements should be checked and a severe reprimand administered in the presence of the jury, to the attorney who is guilty of this violation of duty.'" *Marble v. Walters*, 19 Mo. App. 134; *Roeder v. Studt*, 12 Mo. App. 566. See, also, the following: *Gibson v. Zeibig*, 24 Mo. App. 65; *Brown v. Swineford*, 44 Wis. 282; *Rudolph v. Landwerlen*, 92 Ind. 34; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Cleveland Paper Co. v. Banks*, 15 Neb.

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20; *Wolffe v. Minnis*, 74 Ala. 386; *Scripps v. Reiley*, 35 Mich. 370; 1 Thompson on Trials, secs. 955, 958 960.

The judgement will be reversed and the cause remanded for a new trial. All concur.

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G. P. SELECMAN, Respondent, v. H. C. KINNARD *et al.*, Appellants. 55 635 81 22

**Kansas City Court of Appeals, January 8, 1894.**

1. **Landlord and Tenant:** LIEN ON CROP: EXECUTION V. TENANT. A judgment creditor of a tenant who pays his rent in part of the crop, cannot buy his execution on the immature crops growing on the rented premises, nor can he compel the landlord to take an estimated value of such crops so as to discharge his lien, and the landlord may enjoin the officer having such execution.
2. **Execution:** CROPS. Growing crops being *fructus industriales* are subject to seizure and sale under execution.

*Appeal from the Cass Circuit Court.*—HON. W. W. WOOD, Judge.

AFFIRMED.

*W. L. Jarrott* for appellant.

(1) "All goods and chattels not exempt by statute are liable to be seized and sold upon execution." Revised Statute, 1889, sec. 4915. (2) "The growing crops produced by annual planting and cultivation are chattels, and as such may be levied upon and sold under execution." Kelly's Justice Practice, p. 157; *Lindley v. Kelly*, 42 Ind. 294; *Preston v. Ryan*, 45 Mich. 174. (3) "An officer having an execution against one may lawfully enter the close of the debtor and cut down and seize and sell, as personal estate, corn and other produce of the soil, when growing and ripe and in a fit

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state to be gathered." *Penhallow v. Dwight*, 7 Mass. 34; *Whipple v. Foote*, 2 Johns. 216; *Harkwell v. Bissell*, 17 Johns. 128; *Stewart v. Doughty*, 9 Johns. 112; Kelly's Justice Practice, *supra;* 4 N. Y. C. L. 618; *Veach v. Adams*, 51 Cal. 611; *Brouch v. Wiseman*, 51 Ind. 3; *Bernol v. Hovious*, 79 Am. Dec. 147. (4) "Although growing crops are not part of the realty, unless severed from the soil, yet for the purpose of levy and sale on execution, they are suffered to be treated as personalty." 4 American and English Encyclopedia of Law, p. 892; *Gillitt v. Traox*, 29 Minn. 528; *Garth v. Caldwell*, 72 Mo. 622; *Pratt v. Coffman*, 27 Mo. 424. Crops pass to devisees as personal property. (5) "The undivided interest of tenants in common may be seized and sold under attachment, if the property is severable." 6 Lawson's R. R. &. P., p. 4, 449. *Newton v Howe*, 29 Wis. 531.

*Burney & Burney* for respondent.

(1) Injunction is the proper remedy to restrain the illegal seizure of personal property, where an action at law for damages would not afford an adequate remedy. Revised Statutes, 1889, sec. 5510; *Bank v. Kercheval*, 65 Mo. 683; *McPike v. West*, 71 Mo. 189; *Turner v. Stewart*, 78 Mo. 480; *Harris v. Township Board*, 22 Mo. App. 465. (2) A court of equity will interfere by injunction to protect the owner of an equitable interest or right in property, where the ordinary legal actions are not adequate to its enforcement. Upon this principle, the landlord has such a lien upon the crops grown upon the rented premises, as will be protected and enforced in a court of equity. Revised Statutes, 1889, sec. 6376; *Hewlitt v. Stockwell*, 27 Mo. App. 328; *Knox v. Hunt*, 18 Mo. 243; *Saunders v. Ohlhausen*, 51 Mo. 163; *Sheble v. Curdt*, 56 Mo. 437; *Price v. Roetzell*, 56

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Mo. 500. (3) Plaintiff had no remedy at law. No act of the tenant had given him ground for attachment; and, not being entitled to the immediate possession of the crop, he could not maintain replevin therefor. *Sheble v. Curdt*, 56 Mo. 438; *Boeger v. Langenberg*, 42 Mo. App. 11; *Chandler v. West*, 37 Mo. App. 631; *Hubbard v. Moss*, 65 Mo. 647. (4) In judicial tribunals causes are to be tried upon the issues presented by the pleadings, and the judgment or decree of the court should be such as follows as a logical result from the pleadings and the evidence. Greenleaf on Evidence, secs. 50 and 51; *State v. Roberts*, 62 Mo. 388; *Seibert v.* Allen, 61 Mo. 482; *Bank v. Armstrong*, 62 Mo. 59; *Wilson v. Albert*, 89 Mo. 537; *Brooks v. Blackwell*, 76 Mo. 309; *Weil v. Posten*, 77 Mo. 284; *Estes v. Fry*, 22 Mo. App. 80. (5) An offer of compromise made out of court by one party, but not accepted by the other, is not admissible as evidence. *Estes v. Fry*, *supra*; *Smith v. Shell*, 82 Mo. 215. If made in court it should have no greater force and effect.

Smith, P. J.—This was a suit for an injunction. The undisputed evidence in the case shows that the plaintiff rented his farm to one Pearson for one year from March 1, 1892, for one-third of all the corn and oats and one-half of the flax and wheat raised thereon during said cropping year, which crops were to be harvested and gathered by Pearson. There was some pasture and meadow land for which Pearson agreed to pay plaintiff $39 in money.

On the twenty-eighth of June, 1892, the defendant, Metzgar, who had previously recovered judgment against Pearson before a justice of the peace, caused an execution to be issued on his judgment and delivered to defendant, Kennard, the township constable, who levied the same upon the said crops, and was

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taking the same into his custody when this suit was brought by plaintiff to enjoin him from further interference therewith. A temporary injunction was awarded, which on final hearing was, by the decree of the court, made perpetual; and it is from this decree that the appeal is prosecuted by the defendants.

The statute in regard to landlords and tenants gives the landlord a lien upon the crop grown on the premises in any one year and continues the same for eight months after the rent becomes due. Revised Statutes, sec. 6376. By the terms of the lease, the plaintiff's rent was not due until the crops were harvested and gathered. None of the crops grown by Pearson, the tenant, were in this condition at the time of the constable's attempted levy and seizure. Nor does it appear that the rent for the meadow and pasture lands was then due. The corn that had been planted was yet uncultivated and immature. The oats, wheat and flax were still standing on the ground where grown. The statutory lien of the plaintiff for his rent covered all these crops. They were a seeurity for his rent. To allow a stranger under an execution to interfere with these crops under such conditions it is plain to be seen, would result disastrously to the landlord.

Can an officer under the process of execution seize and sell the crops, mature and immature, of the tenant without reference to the interest of the landlord whose security for his rent they are? Suppose the young corn thus levied on and sold has just appeared above the ground, as was the case here, who is to cultivate it and account to the landlord for the rent? A tenant can make no assignment of his interest without the consent of the landlord, and it certainly cannot be that a constable, acting under his writ, even if considered as an attorney in fact for the tenant, can perform an

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act for him which by the law is forbidden to the tenant himself. A landlord cannot be compelled to accept a forced tenant of this kind in lieu of one of his own selection. He may have contracted with a tenant whose skill and industry in the cultivation of his crops would bring an abundant harvest, while the forced tenant may be unskillful and slothful, and whose labor may bring the owner of the soil but poor returns for its use.

The law disfavors any act of another, whether officer or not, whose results are likely thus to disturb the landlord in his relations with his tenant. If the officer can enter under his writ harvest and sell the matured crops, what becomes of the lien of the landlord for his undue rent?

It is argued by the defendants that they offered to pay the plaintiff, after this suit was begun, the rent that was due him. This afforded no defense. The tender was not made before the levy, and could not have been, for the reason that the landlord was entitled to one-third of the corn and oats and one-half of the wheat and flax that was grown by the tenant on the land. He could not be forced to accept the estimated value of these cereals in lieu of the cereals themselves. Besides this, the corn was then in that immature condition that no estimate could have been made of its yield or the value thereof.

The law has long been settled in this state that the crops during the existence of the landlord's lien is not subject to the process of the law without payment of the rent,—which was impossible in this case,—at the suit of another creditor, as the lien of the landlord protects it from sale. Nothing can be seized under execution which cannot be sold. *Knox v. Hunt*, 18 Mo. 243; *Sanders v. Oldhausen*, 51 Mo. 163; *Sheble v. Curdt*, 56 Mo. 437; *Price v. Roetzell*, 56 Mo. 500.

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Of course, if it were not for the existence of the landlord's lien, these crops being *fructus industriales* and regarded, therefore, as personal chattels, independent and distinct from the land, were the subject of seizure and sale under execution. Revised Statutes, sec. 4915; *Smock v. Smock*, 37 Mo. App. 56; *Garth v. Caldwell*, 72 Mo. 622.

It is conceded by the defendants that the landlord had the crops in possession with a special lien thereon at the time of the attempted seizure, which we think was sufficient to protect it from seizure and sale under the execution of defendant, Metzgar, until the former had received his share of the cereals and his money rent was paid. It follows that the trial court did not err in its decree, which must be affirmed. All concur.

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FRANK N. PRICE, Respondent, v. GEORGE MERRITT *et al.*, Appellants.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Mechanics' Liens:** LIENABLE AND NON-LIENABLE ITEMS. A lien paper is not inadmissible because some of the items are non-lienable, when they are separately stated and not mingled with lienable items.

2. **Trial Practice:** INSTRUCTIONS IN TRIAL BEFORE COURT. In trials before the court instructions are unimportant save as showing upon what theory the court arrived at the results.

3. **Mechanics' Liens:** TITLE IN MORTGAGEE. Where the title to the real estate is in a mortgagee, who directs and assents to an improvement, such real estate will be subject to the lien for such improvement.

4. ———: COMMISSION: DRAYAGE. Items for drayage, freight and commission are proper charges in a lien account, where the contract for furnishing the material was that the material-man should have ten per cent. above cost and carriage to him.

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5. ———: ACCOUNT: APPLICATION OF PAYMENTS. Payments were made without direction as to their application and were not at the time applied by the creditors. *Held*, the court properly applied them to the non-lienable and unsecured portion of the account.

*Appeal from the Cass Circuit Court.*—HON. W. W. WOOD, Judge.

AFFIRMED.

*Noah M. Givan* for appellant.

(1) There is a mingling together of items lienable with those non-lienable so that they cannot be separated upon an inspection of the account. Neither does the account show an itemized statement of credits or payments. *Guass v. Hussmann*, 22 Mo. App. 118; *Foster v. Wolfing*, 20 Mo. App. 89; *Nelson v. Withrow*, 14 Mo. App. 279; *Riley v. Milling Co.*, 44 Mo. App. 525; *Smith v. Haley*, 41 Mo. App. 620; *Rude v. Mitchell*, 97 Mo. 373; *Grace v. Nesbit*, 109 Mo. 17; *Curless v. Lewis*, 46 Mo. App. 280. (2) The contract for furnishing materials was not made with the owner or proprietor of the premises, his agent, trustee, contractor or subcontractor. Revised Statutes, 1889, sec. 6705; *Garnett v. Berry*, 3 Mo. App. 197; *Squires v. Fithian*, 27 Mo. 134; *Porter v. Tooke*, 35 Mo. 107; *Kline v. Perry*, 51 Mo. App. 422; *Henry v. Mahone*, 23 Mo. App. 83. (3) The items of drayage, freight and commission charged in plaintiff's account, are not lienable and they cannot be made so by contract. The statute only gives a lien for "work or labor done, or materials, fixtures, engine, boiler or machinery furnished," and drayage, freight and commission are neither of these. Revised Statutes, 1889, sec. 6705; *Lowis v. Cutter*, 6 Mo. App. 54; *Nelson v. Withrow*, *supra; Blakey v. Blakey*, 27 Mo. 39. (4) The court committed error in refusing defendant's instruction



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number 5, and in modifying and giving the same as modified. Unless the material sued for was used in the building upon which the lien is claimed, then there is no lien. *Shulenberg v. Prairie Home Inst.*, 65 Mo. 295; *Simmons v. Carrier*, 60 Mo. 582; *Fitzpatrick v. Thomas*, 61 Mo. 561; *Deerdorfer v. Everhart*, 74 Mo. 37; *Fathman v. Ritter*, 33 Mo. App. 407. (5) The court committed error in making application of payments made by defendants Wallace and Calvin Merrill in such manner as to preserve, as far as possible, the lien of plaintiff, instead of applying such payment to the oldest items of the account sued on. 18 American & English Encyclopedia of Law, pp. 245, 246, 247 and 249; *Hersey v. Bennett*, 28 Minn. 86; 41 Am. Rep. 271; *Miller v. Miller*, 23 Me. 22; 39 Am. Dec. 597; *United States v. Kirkpatrick*, 9 Wheat. 720; *Poulson v. Collier*, 18 Mo. App. 60; *Goetz v. Piel*, 26 Mo. 641; *Nelson v. Withrow*, *supra*.

*W. D. Summers* for respondent.

(1) The account filed as a basis for the lien complies in full with the requirements of the law as laid down by the following authorities. *Pullis v. Hoffman*, 28 Mo. App. 666; *McLaughlin v. Schawacker*, 31 Mo. App. 365; *Lumber Co. v. Strimple*, 33 Mo. App. 154; *Miller v. Whitelaw*, 28 Mo. App. 639; *Johnson v. Mfg. Co.*, 23 Mo. App. 456; *Lumber Co. v. Kesogan*, 52 Mo. App. 418; *Grace v. Nesbitt*, 119 Mo. 9; *Deardoff v. Roy*, 50 Mo. App. 70–77. (2) Plaintiff was original contractor and material-man, and furnished the material with the knowledge and consent of the legal owner, whose property was thereby made liable. *O'Leary v. Roe*, 45 Mo. App. 573; *Allen v. Sales*, 56 Mo. 28; *Collins v. Megraw*, 47 Mo. 395; *Tucker v. Gest*, 46 Mo. 339; *Cline v. Cline*, 51 Mo. App. 422;

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*Seaman v. Paddock*, 51 Mo. App. 466; *Cowen v. Paddock*, Sup. Ct. 17 N. Y.; Sup. 387, 43 N. Y.; S. R. 342; *Spruch v. McRoberts*, Sup. Ct. 45 N.Y.; S. R. 624; 19 N. Y. Sup. 128; *McCue v. Whitewell*, 30 N. E. Rep. (Mass.) 1134; *Carew v. Slubbs*, 30 N. E. Rep. (Mass.) 219. (3) The court made application of payment so as to preserve the lien, in accordance with the rule laid down by the authorities. *Waterman v. Younger*, 49 Mo. 413; *Gantler v. Kemper*, 58 Mo. 567; *McKelvey v. Janis*, 87 Mo. 414; *McQuaide v. Stewart*, 48 Pa. St. 198; *Foster v. McGraw*, 64 Pa. St. 464–469; *Christnot v. Montana & S. M. Co.*, 1 Mont. 44; *Capron v. Strout*, 11 Nev. 304; Phillips' Mechanics' Lien [2 Ed.] sec. 287, p. 478; *Nichols v. Culver*, 51 Conn. 177.

Ellison, J.—This action was brought to enforce a mechanics' lien. The trial was before the court without a jury. Judgment was entered for plaintiff, and one of the defendants appeals.

There was an objection taken to the sufficiency of the petition in that, as stated, it failed to show that "these defendants were original contractors, or whether plaintiff was charged as an original contractor or subcontractor." This objection is not borne out by the allegations of the petition. So of the lien paper we will say, in answer to the objection to its introduction, that it was properly admitted in testimony. There was evidence in the cause for and against the material allegations of the petition, and on this evidence the court made a special finding of facts. An objection to the account or lien paper is that it contained items which were lienable and those which were not. This would not affect that part of the account which was for lienable material. It is, however, a part of the objection that the lienable and non-lienable articles are so mingled that they cannot be distinguished. But the

lien paper does not bear out such objection. There is no mixing of lienable and non-lienable matter. The account itself is good and sufficient on its face, and if any article is not lienable it arises upon the evidence showing that it was not furnished, or did not go into the improvement. There is no combining together into one item proper and improper material. The fact that several items appear in an account, some of which are proper and some not, as before stated, does not affect those that are proper.

The objection based upon the four months' limitation was not made at the trial and, besides, is not the limitation which applies to plaintiff's lien.

Since the court tried the case without a jury the instructions are unimportant save as showing upon what theory the court arrived at the result, and in this respect we have no hesitation in declaring them free from error. Instruction number 5 could not have been understood by the court as contended by defendants.

As to this appealing defendant, the court, in its finding of facts, found "that the defendant, George Merrill, is the owner of record of the real estate against which the lien is sought to be enforced, and the same being purchased by the other defendants, and being conveyed to the said George Merrill, at the instance of the other defendants, for the purpose of securing him in an indebtedness of about the sum of $1,000 due to the said George Merrill from the said Calvin Merrill and B. M. Wallace; that the said defendants, Calvin Merrill and B. M. Wallace, contracted for the construction and erection of the said building, under the authority, by consent, and with the approval of, the said George Merrill, he, the said George Merrill, furnishing to the defendants, Calvin Merrill and B. M. Wallace, the sum of $500, which was to be used in the construc-

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tion of said building, and was a part of the above mentioned $1,000.

This finding is, in effect, that the defendant, George Merrill, held the legal title to the property as security for $1,000 loaned to the other defendants. In other words, he was a mortgagee, and as such he directed and assented to the improvements for which this lien is sought. Under these circumstances the court was right in holding the property, the title to which was thus in said Merrill, subject to the lien. *O'Leary v. Roe*, 45 Mo. App. 573; *Allen v. Sales*, 56 Mo. 28; *Collins v. McGraw*, 47 Mo. 495; *Spruck v. McRoberts*, New York Court of Appeals, October Term, 1893.

Among the items in the lien paper were those for freight and "commission," or a per cent. above cost. On this the court made the following finding and declaration: "That the items of drayage, November 28, 1891, $1; December 7, 1891, freight on same from Kansas City, $2.60, and commission ten per cent., $5.95; December 14, ten per cent. commission, $1.30; amounting in all to $10.85, are lienable, the plaintiff having agreed to sell lumber to defendants, Wallace and Calvin Merrill, at ten per cent. above cost and carriage to him, and these items being so stated on plaintiff's books for the purpose of showing a compliance with the contract."

This was a proper disposition of the matter. The effect of this ruling of the court was simply to allow plaintiff the contract price for his material.

There were matters of account between these parties for which there was no lien. Payments were made but no direction given by defendants for their application, nor were they at the time applied to either by plaintiff, he simply entering credit generally. Under these circumstances the trial court properly applied the credit to that portion of the account which was not

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lienable and for which there was no security. This is in keeping with an equitable principle which has frequently received the approbation of the courts in cases of this nature. *Gantler v. Kemper*, 58 Mo. 567; *McQuaide v. Stewart*, 48 Pa. St. 198; *Christnot v. Montana*, 1 Mont. 44; *Capron v. Strout*, 11 Nev. 304; *Foster v. McGraw*, 64 Pa. St. 464.

In the latter case it was held that, when one who owes several debts to another makes payment and no application is made by either party, the law applies them to the debt which is least secured.

This court by HALL, J., in *Poulson v. Collier*, 18 Mo. App. 607, and the St. Louis court of appeals in *Goetz v. Piel*, 26 Mo. App. 634, by THOMPSON, Judge, held that under such circumstances the credit would be applied by the court, in the absence of designation by the parties, generally to the oldest items of the account, except in cases where some of the debts are more precarious, in which instance the payment will be applied to those in preference to others which are secured. This is, also, practically, the view as stated by the supreme court in *Beck v. Hass*, 111 Mo. 268.

A consideration of the other objections urged by defendants has not resulted in the conclusion that the judgment should be disturbed, and it is accordingly affirmed. All concur.

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STATE OF MISSOURI *ex rel.* BANK OF BELTON, Plaintiff in Error, v. W. A. WRAY *et al.*, Defendants in Error.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Public Corporations**: AGENT'S POWER IN AND OUT OF CONVENTION. Certain individuals convened and acting as a body corporate may transact certain business and exercise certain powers given the corporations, yet these same parties not so convened are powerless, even by unanimous consent as individuals, to perform the duties enjoined on the body.

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2. **Board of Equalization:** RECORD: CLERK'S ASSISTANCE: CORRECTING MISTAKES. A mere assistant to the secretary of the board of equalization has no authority to make the record of the board, and his attempt to do so is a mere mutilation, unless made under the secretary's direction; and if made under such direction, the secretary, upon discovering mistakes immediately thereafter, may correct any error and make it conform to the truth.

3. ———: ———: APPROVAL. The statute does not require the approval of its record by the board of equalization, and the absence thereof can not impair the record's legal effect; and if the board were required to sign the record, the failure to do so would not invalidate it.

*Error to the Cass Circuit Court.*—HON. W. W. WOOD, Judge.

AFFIRMED.

*Chas. W. Sloan* and *Jas. S. Brierly* for plaintiff in error.

(1) *Certiorari* was relator's proper remedy. *Mining Co. v. Neptune*, 19 Mo. App. 438; *State ex rel. v. St. Louis Co.*, 47 Mo. 594; *State ex rel. v. Dowling*, 50 Mo. 134; *Railroad v. Board of Equalization*, 64 Mo. 294; *State ex rel. v. Board of Equalization*, 108 Mo. 235. *First*. The office and nature of the writ of *certiorari* is to bring up the record of the inferior court, and to show such defects as appear on the face of the record. 50 Mo. 137, *supra; State ex rel. v. Powers*, 68 Mo. 323; *State ex rel. v. Moniteau Co.*, 45 Mo. App. 391; *Rogers v. Court of Clinton Co.*, 60 Mo. 101; *State ex rel. v. City of Kansas*, 89 Mo. 34; *State ex rel. v. Cauthorn*, 40 Mo. App. 94; *State ex rel. v. Heege*, 37 Mo. App. 338; *Railroad v. Young et al.*, 96 Mo. 39; *State ex rel v. Smith*, 101 Mo. 174; *State v. Schneider*, 47 Mo. App. 669, 675. *Second*. Facts outside of the record cannot be called to the attention of the court. *Railroad v. Board of Equalization*, 64 Mo. 294, 308; *House v. County Court*, 67 Mo. 522; *Halpin v. Powers*,

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68 Mo. 320; *State ex rel. v. Kansas City*, 89 Mo. 34. *Third.* The writ of *certiorari* is not a citation to justify action of lower court. *State ex rel. v. Dowling*, 50 Mo. 134. *Fourth. Certiorari* operates as stay of all proceedings from time of service. *Patcher v. Mayor, etc., of Brooklyn*, 13 Wend. 664; *Hunt v. Lambertvill*, 46 N. J. L. 59; *Hyslop v. Finch*, 99 Ill. 171; 3 American and English Encyclopedia, 66; 2 Desty on Taxation, 639; *Gaertner v. City of Fond du Lac*, 34 Wis. 497; *Conover v. Devlin*, 24 Barb. 636. *Fifth.* In making a transcript of a record called for, clerk's duty is to copy record as it then appears on file, without assuming to make amendments. *Shout v. State*, 55 Ala. 77. *Sixth.* On service of writ the inferior tribunal must transmit a full certified transcript to court, awarding writ as it then is. *McMannus v. McDonough*, 4 Ill. App. 180. *Seventh.* Writ of *certiorari* should issue after final determination or action of lower tribunal. *State ex rel. v. Edwards*, 104 Mo. 127; *State ex rel. v. Schneider*, 47 Mo. App. 669, 675. (2) The record certified to May 25, 1893, failed to show affirmatively the board had acquired any jurisdiction to increase relator's assessment. *Lingo v. Buford*, 20 S. W. Rep. 459 and authorities cited, 96 Mo. 39; Black on Tax Titles, [2 Ed.] sec. 140; Code, 1889, secs. 7519, 7520; 19 Mo. App. 439; *Black v. McGonigle*, 103 Mo. 199; 108 Mo. 235; *State v. Railroad*, 26 Pac. Rep. 225; *People v. Supervisors*, 35 Barb. 408; *State ex rel. v. Com'rs*, 14 Mo. App. 297; *State ex rel. v. Com'rs*, 88 Mo. 144. (3) The acts of the board were judicial. *St. Louis Mut. L. v. Charles*, 47 Mo. 462; *Railroad v. McGuire*, 49 Mo. 482; *Black v. McGonigle, supra.* (4) It was error to admit as the correct one the record made and signed after June 5, the board having finally adjourned May 2; no amendment or change in the record could be made after last date. *Hill v. St. Louis*, 20 Mo. 588; *Mann v. Warner*, 22 Mo. App. 581;

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*Belkin v. Rhodes*, 76 Mo. 643, and authorities cited. *First.* Said record could not be changed or amended on mere recollection of members of board as to what occurred before them. 76 Mo. 643; *Ross v. Ross*, 83 Mo. 100. *Second.* On removal of cause to circuit court by *certiorari* jurisdiction cannot be conferred by amendment. *McQuoid v. Lamb*, 19 Mo. App. 153; *Olive v. Zeigler*, 46 Mo. App. 193. *Third.* No amendment could be made to record by clerk without the sanction of the board or court as such; after adjournment the functions of the board had ceased. Revised Statutes, 1889, secs. 2115, 7520; *State ex rel. v. St. Louis*, 67 Mo. 113; *Brecht v. Corby*, 7 Mo. App. 305; *Newton v. Strang*, 48 Mo. App. 542; *State ex rel. v. City of Kansas*, 89 Mo. 39.

*A. A. Whitsitt* and *W. L. Jarrott* for defendants in error.

(1) The secretary of the board of equalization, as soon as he learned that an incorrect record had been made, had the right to correct the same and make an accurate record according to the true facts. *Railroad v. County Court*, 57 Mo. 223; *Fletcher v. Coombs*, 58 Mo. 430; *Williams v. School District No. 1*, 38 Mass. 75–80; *Hutchinson v. Board of Equalization*, 23 N. W. Rep. (Iowa) 249. (2) Relator claims that the clerk did not write record in time. This is not correct; but, conceding that it is, relator cannot complain of this because it is provided in the chapter of Revised Statutes relating to revenue: "Nor shall failure of an officer or officers to perform the duties assigned him or them on the day, or within the time specified, work any invalidation of any such proceedings." Revised Statutes, sec. 7708; *Railey v. Guinn*, 76 Mo. 263; Cooley on Taxation, 320, 321. (3) We insist that the clerk did not make or change the record. This statement by relator

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is not correct. We may waive this point and admit that the order placed of record by James Maxwell may be considered as a part of the record; we insist that the secretary of the board had the right to change it. If the statute required him to keep an *accurate* record, and an employee of the office, without the knowledge of the clerk, placed of record an order which the board did not make, we insist that the clerk had the right to change the order so as to make it conform to the true facts. *Wells v. Battelle*, 11 Mass. 477; *Taylor v. Henry*, 2 Pick. 307; *Halleck v. Boylston*, 117 Mass. 460; *Mott v. Reynolds*, 27 Vt. 206, 208; Cooley on Taxation, 321; 1 Dillon on Municipal Corporations [3 Ed.], sec. 297; *Black v. McGonigle*, 103 Mo. 200.

GILL, J.—This is a case of *certiorari* issued by the circuit court and directed to the defendants, composing the board of equalization in Cass county, whereby they were ordered to certify up the records of such board, so that the court might determine whether or not it had acted arbitrarily and illegally in raising the personal assessment of the relator. The complaint, as made by the bank in its petition, was that the said respondents, acting as said board of equalization, had raised its assessment as returned by the township assessor from $18,500 to $25,900 without first giving it notice, or permitting it to be heard on the matter, as the statute provides. (Revised Statutes, 1889, sec. 7519.)

Respondents, in their return to the writ, alleged that the bank had notice of the proposed raise, as provided in the statute, and that the officers thereof appeared on the fourth Monday in April, 1893, and sought to show reasons why such assessment should not be increased; but that such reasons were not satisfactory to the board, and the said increase was

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adhered to. And the respondents brought up what purported to be the complete record of the board of equalization, duly certified by the county clerk, the keeper and custodian of such record. This record clearly showed that the relator had legal notice of the proposed raise, and in addition thereto that it had appeared before the board and contested the increase.

Following this the relator came into court and in the nature of a reply, pleaded *nul tiel record;* that the pretended record of May 2, 1893, purporting to recite notice and appearance, was false; and then proceeded to state a record of that date wherein it was not recited that notice was given the bank or that it appeared at the hearing, and prayed the court to quash respondents' return. The issue thus made was tried, and the court found and declared the record as set out in respondents' return to be the true one of the board, overruled relator's motion to quash and confirmed the action of the board, and from a judgment in accordance therewith the bank has appealed.

As supplemental to the foregoing cursory view of this controversy, it seems necessary to state that, as Cass county has adopted township organization, its board of equalization, as constituted under section 7517 of the Revised Statutes, is composed of respondents Wray, Meyers and Britt, judges of the county court; Bird, the surveyor; Hatton, sheriff, and Maxwell, the county clerk. The county clerk, however, has no vote in its proceedings, but as secretary it is made his especial duty "to keep an accurate record of the proceedings and orders of the board." Section 7520.

Beginning with April 3 (the first Monday) 1893, this board met to consider the assessment lists sent up by the township assessor. The sessions were held at the county clerk's office from day to day until May 2, and during the progress of their work the board

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thought it just and proper to raise the valuation on the personal property of relator and others. And that of this proposed increase the relator had, *in fact*, due notice, and indeed appeared and opposed the same, seems to be admitted. The board held its final meeting on May 2; and as usual in matters of this kind there was such a large amount of business transacted on such last day, that the secretary of the board (the county clerk) was unable at the time to write up the complete record. He kept, however, full memoranda or minutes of the proceedings and orders of the board, intending thereafter to prepare the formal entries with more care, as he was warned that there might be subsequent litigation; and with this view he had asked the assistance of the county attorney.

A few days after the final adjournment of the board, the county clerk's son, not a deputy but a mere assistant about the office, undertook to, and did, write up what he understood were the proceedings of the board at its last sitting, but he failed to make the record full and complete in that it was not stated that notice was given or that the parties whose lists were raised had appeared at the hearing. This entry was spread on the record book without the knowledge or consent of the county clerk, and, it would seem, while he and the prosecuting attorney were, from time to time, considering of what such record should consist. Subsequently (and about June 5) the clerk and secretary of the board canceled the entry thus inadvertently spread on the records by young Maxwell, and wrote on the pages following, what he understood was a complete statement of the board's proceedings of May 2. This record, so written up by the county clerk, in person, was signed by each and all of the members of the board of equalization; and it is this record that the lower court held as the true one and

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under which respondents have justified their action in increasing relator's assessment. Whilst, however, the so-called record, so made up by the clerk's son, was spread on the board's book, and before the accurate and correct record had been written thereon, this suit was brought. But it stands uncontradicted by the testimony that it was then in course of preparation, and that such last and correct record is in exact accord with the truth and supported in every detail by the minutes kept by the board's secretary.

It will be seen that this case must turn upon the question as to which of the two entries—the one written by the clerk's son or the one subsequently prepared and spread on the books by the clerk himself—should be treated as the proper record of the board. The trial court decided in favor of the latter, and in so holding we think no error was committed.

Much of appellant's argument is to the effect that, after the final adjournment of May 2, the board of equalization had, as a board, ceased to exist; that its functions as such were gone, and that, therefore, it was not in the power of its members thereafter to make a new record or even correct any theretofore made. We find no fault with this contention in the abstract. The principle is well understood, that while certain individuals, convened and acting as a body corporate, may transact certain business or exercise such powers as are given to the organization, still these same parties, when not so convened and not acting as an organized body, are powerless as individuals to perform the duties enjoined on the body, even though each and all of them concur in doing the particular thing. *Johnson v. School Dist.*, 67 Mo. 321; *Kane v. School Dist.*, 48 Mo. App. 408–415. We concede, then, to appellant's counsel that, when the different members theretofore composing the county board of equalization, on or

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about June 8, approved the last record which was prepared by Maxwell the county clerk, and assumed to disapprove the written entry made by Maxwell's son, they were performing a mere nugatory act. They were not acting as an organized body for that had been adjourned *sine die*, and what they might do individually in the matter gave no strength to the record thus made by the secretary of the board.

But we base our decision on the following view of the case: The county clerk was, by the terms of the statute, the secretary of the board of equalization. It was his duty (and his alone) under the express mandate of the law, "to keep an accurate record of the proceedings and orders of the board." Revised Statutes, 1889, sec. 7520. He was bound to the performance of this by his oath of office, and failure or malfeasance in this respect would subject him to such punishment as the law would inflict. Now this officer (this secretary of the board designated by the statute) made but *one* entry in his book of the doings of the board of May 2, and that was the writing mechanically performed on or about June 5; and from this record the jurisdiction of the board to raise relator's assessment is manifest, and it is conclusive, too, on the relator. *Kane v. School Dist.*, 48 Mo. App. 414. The entry wrongfully and inadvertently made by young Maxwell was without authority, null and void. He was not a *deputy*, even, of the board's secretary, and therefore had no semblance of authority to act for him. It was as if one an entire stranger to the office had attempted to write the proceedings of the board. He could only perform this duty by direction of the rightful officer, and such direction he did not have. This first pretended record of the proceedings of May 2 was then a mere mutilation.

But, even were this first entry made under the

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direction of the secretary of the board, it would yet seem within the power of the rightful officer, when discovering mistakes immediately thereafter, to correct any error and make it conform to the truth. Cooley on Taxation [2 Ed.], 320 etc; *Halleck v. Boylston*, 117 Mass. 469; *Welles v. Battelle*, 11 Mass. 477; *Mott v. Reynolds*, 27 Vt. 206. This seems to have been uniformly allowed where innocent third parties are not affected.

The record last made in this case was the only accurate and complete record. It was unquestionably based on the exact truth and written up from *memoranda* or minutes made by the secretary whilst the board was in session. We fail, then, to discover any good reason, technical or otherwise, why it should not receive that recognition to which it is justly entitled. There was no valid objection to the introduction of this record because of the fact it was written out in full and spread on the records some thirty days or more after the adjournment of the board. It was prepared from the minutes kept by the secretary at the time; and his subsequent mechanical performance of writing the entry to conform to these memoranda cannot affect its validity. The statute does not require the approval of the record by the board, and hence the absence of such action by that body cannot impair its legal affect. And, even were the board required to sign the record, still, under the rulings in this state, a failure so to do would not invalidate it. *Platte County v. Marshall*, 10 Mo. 345; *Fontaine v. Hudson*, 93 Mo. 62.

After a careful consideration of the very able and elaborate briefs and arguments on both sides of this controversy, we find the judgment of the lower court for the right party, and it is, therefore, affirmed. All concur.

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AMERICAN RUBBER COMPANY, Appellant, v. J. H. WILSON, Defendant; T. W. CUNNINGHAM, Interpleader and Respondent.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Usury:** WHO MAY TAKE ADVANTAGE OF STATUTE: ATTACHMENT CREDITOR. The defense of usury is a personal privilege of the debtor, his privies in representation, in blood, or in estate, as his vendee, execution creditor, or, as in this case, his attachment creditor who may defend against his debtor's mortgage on the ground that it secures usury, as provided in section 2, page 171, Laws, 1891.

*Appeal from the Jasper Circuit Court.*—HON. W. M. ROBINSON, Judge.

REVERSED AND REMANDED.

*Fred. Basom* for appellant.

(1) The only question presented by the appeal in this case, is a construction of the act of 1891, statute governing usury and the validity of liens or mortgages upon personal property. I contend that the court erred in his findings of law in favor of the interpleader and against the plaintiff. (2) If the mortgage set up by the interpleader was invalid and illegal and the statute declares it so to be, it could convey no title whatever to the property therein described; and in Georgia, in the case of *McLaren v. Clark*, reported in 7 S. E. Rep., p. 250, the court holds that whether a deed infected with usury be made under the act of 1871 (code of Georgia, 1966), or under the general law, it is equally void as to title and cannot have the effect as an equitable mortgage, because no title passes. *Trust Company v. Burton*, 74 Wis. 329; 43 N. W. Rep.

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141; *Brooks v. Todd*, 4 S. E. Rep. (Ga.) 156; *Meyer v. Cook*, 85 Ala. 417.

*C. H. Montgomery* and *H. C. Lowrance* for respondent.

(1) The defense of usury is personal to the debtor. It cannot be urged by anyone but the mortgagor or his privies in blood, estate or contract. A subsequent incumbrancer or purchaser cannot set it up. *Ready v. Huebner*, 46 Wis. 692; *Bensley v. Homier*, 42 Wis. 631; *Darst v. Bates*, 95 Ill. 493; *Safford v. Vail*, 22 Ill. 327; *Bank v. Bank*, 14 N. E. Rep. 859; *Sellers v. Botsford*, 11 Mich. 59; *Baskins v. Calhoun*, 45 Ala. 582; *Fenno v. Syre*, 3 Ala. 458; *McGuire v. Van Pelt*, 55 Ala. 344; *Butts v. Broughton*, 72. Ala. 294. Nor by mortgagor's wife claiming under a subsequent voluntary conveyance. *Cain v. Cimon*, 36 Ala. 168; *Sav. Inst. v. Copeland*, 32 N. W. Rep. (Iowa) 95; *Bonnell's appeal*, 11 Pa. App. 211; *Bank v. Bingham*, 50 Vt. 105; *Cramer v. Lepper*, 26 Ohio St. 59; *Smith v. Bank*, 26 Ohio St. 141; *Studabaker v. Marquardt*, 55 Ind. 341; *Pritchett v. Mitchell*, 17 Kan. 355; *Fullerton v. McCurdy*, 4 Lans. (N. Y.) 132; *Carmichael v. Bodfish*, 32 Iowa 418; *Loomis v. Eaton*, 32 Conn. 550; *Anstin v. Chittenden*, 33 Vt. 553. Usury in a mortgage cannot be taken advantage of by a judgment creditor of the mortgagor. *Mason v. Pierce*, 31 N. E. Rep. (Ill). 503; *Lee v. Feamster*, 21 W. Va. 108; s. c., 45 Am. Rep. 549; *Reed v. Eastman*, 50 Vt. 67; *Adams v. Robertson*, 37 Ill. 45. An indorser of a note cannot avail himself of the usurious interest paid by the maker. *Bank v. Sinclair*, 60 N. H. 100; *Stewart v. Bramhall*, 18 N. Y. 139; *Cadys v. Goodnow*, 49 Vt. 400; New York, Delaware, Arkansas, Virginia, Oregon and many other states have for years had statutes



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similar to Laws of Missouri, 1891, p. 170. *Kelley v. Sprague*, 13 N. Y. S. 64; 58 Hun, 611; *Railroad v. Kason*, 37 N. Y. 218; *Dix v. Van Wyck*, 2 Hill, (N.Y.) 522; *Bullard v. Raynerd*, 30 N. Y. 197; *Billington v. Wagner*, 33 N. Y. 31; *Williams v. Tilt*, 36 N. Y. 319; *Bank v. Edwards*, 1 Barb. (N. Y.) 271; *Spengler v. Snapp*, 5 Leigh. (Va.) 478.

Ellison, J.—Plaintiff brought this suit by attachment and levied upon a lot of personal property as being the property of defendant. The interpleader herein claimed the property under a chattel mortgage executed prior to the levy of the attachment. On a trial before the court without a jury, between the interpleader and the plaintiff, the interpleader was successful, and plaintiff brings the case here.

It was admitted that interpleader, as mortgagee, had exacted usurious interest which was included in the mortgage. The court gave the following declarations of law, to which plaintiff excepted:

"1. The court finds as a matter of law that, although it is admitted that the mortgage to T. W. Cunningham, interpleader, contains usury and would be illegal and invalid as between the parties, yet the defense of usury is a personal right and cannot be taken advantage of by the plaintiff in this action, The American Rubber Company.

"2. The court finds, as a matter of law, that the plaintiff in this action, The American Rubber Company, not being a party to the mortgage in which the interpleader claims the goods therein described, although it is admitted that said mortgage contains usury, yet an attaching creditor, as is the plaintiff, under the law, is not permitted to make the defense of usury against said mortgage, as said mortgage is valid, except as to the parties thereto."

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The question for our determination is the correctness of these declarations, which involves a construction of the following provision of a late statute: "In actions for the enforcement of liens upon personal property pledged or mortgaged to secure indebtedness, or to maintain or secure possession of property so pledged or mortgaged, or in any other case when the validity of such lien is drawn in question, proof upon the trial that the party holding or claiming to hold any such lien has received or exacted usurious interest for such indebtedness shall render any mortgage or pledge of personal property, or any lien whatsoever thereon given to secure such indebtedness, invalid and illegal." Laws, 1891, sec. 2, p. 171.

There is no doubt of the correctness of the court's position in declaring that the defense of usury is the personal privilege of the debtor, which he may waive, and that it is not available to third parties. But, while this is the general rule, there are certain exceptions or qualifications to it which are recognized by the law. One who is privy in representation, as the executor, or in blood, as the heir, may invoke the plea of usury. These instances are readily recognized as exceptions. They are, however, not the only exceptions. The privy in estate is another. Thus the vendee of the mortgagor (if he has not contracted or accepted his conveyance in recognition of the mortgage) may set up usury against the mortgagee. Jones on Mortgages, secs. 644, 1493; *Sands v. Church*, 2 Selden, 347; *Maher v. Lanfrom*, 86 Ill. 513; *Bank v. Bank*, 123 Ill. 510; *Loyd v. Scott*, 4 Peters, 205, 230; *Green v. Kemp*, 13 Mass. 575; *Jackson v. Dominick*, 14 Johns. 435; *Merchants' Exchange Bank v. Com. Warehouse*, 49 N. Y. 642; *Trumbo v. Blizzard*, 6 Gill. & J. 18; *Brolasky v. Miller*, 1 Stock. 807; *Pinnell v. Boyd*, 33 N. J. Eq. 600. If this were not so; if it was beyond the power

of the vendee to assail the usurious mortgage when attacked by it, the mortgagor would practically be disabled from selling the property, except by ratification of the usury.

A purchaser at a sheriff's sale is considered as such vendee with such privileges. *Pinnell v. Boyd; Brolasky v. Miller, supra; Carow v. Kelly*, 59 Barb. 239; Jones on Mortgages, secs. 644, 1493.

If a purchaser from the vendor, either by voluntary or involuntary sale, is considered in such legal privity with the vendor as to be permitted to set up usury against the mortgagee, it should logically follow that an attachment or execution creditor, who has seized the property and who is but beginning the process necessary to an ultimate conveyance of the mortgagor's title to the property, ought to be allowed to show that his assailant's pretended title is founded upon an invalid and illegal instrument when attacked by such instrument with the purpose of taking the property from him. We are not without direct authority on the question. *Dix v. Van Wyck*, 2 Hill, 522; *Post v. Dart*, 8 Paige, 639; *Carow v. Kelley, supra; Brolasky v. Miller, supra; Bank v. Bell*, 14 Ohio St. 200, 210; *Banks v. McClellan*, 24 Md. 83; *Coulter v. Selby*, 39 Pa. St. 361; *Pope v. Solomons*, 36 Ga. 541; *Lilienthal v. Champion*, 58 Ga. 158. It is decided in these cases that an execution creditor is considered, for this puspose, as standing in such legal privity with the mortgagor as to empower him to interpose usury to the destruction of the instrument which secures the usury. It is true that an execution creditor has been denied this right. See *Bensley v. Hornier*, 42 Wis. 631, and *Lee v. Feamster*, 21 W. Va. 108. But it is doubtful if such would be the decision, even in those jurisdictions in a case like the one at bar, under a statute like ours. I, therefore,

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can see no season why an attachment creditor is not entitled to the same privilege as an execution creditor. It was pointedly so decided in *Stien v. Swenson*, 44 Minn. 218. He is not merely a general creditor of the mortgagor, but he has so far connected himself with him as to have laid hold of his property with the process of the court issued at his instance, and he is entitled to have out of it all of the interest which the mortgagor may have had in it at the time of the levy of the writ; and such interest, by reason of the statute, is not affected by the usurious mortgage. It is readily conceded that a mere stranger cannot interpose this illegality of the mortgagee's title, as for instance, as is illustrated in *Brolasky v. Miller, supra*, where "A. mortgages land to B. upon a usurious contract for one hundred pounds, and, before the day of payment, B., the mortgagee, is ousted by C., against whom B. brings an action. C. cannot plead the statute of usury, for he hath no title. For his estate is void against the mortgagor." "But a person who, like an execution creditor, asserts a lien upon the property is not a stranger, within the meaning of the rule" as applicable to usury. *Carow v. Kelly*, 59 Barb. 239.

What effect any act of the mortgagor, taken before the attachment waiving the usury, would have on the question, is not involved here.

The judgment is reversed and the cause remanded. All concur.

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J. J. ROBINSON, Respondent, v. THE TROUP MINING COMPANY, Appellant.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Mines and Mining:** POSTING NOTICE OF LEASE: SUBTENANT'S PURCHASE OF LANDLORD'S TITLE. Whera' the landlord on leasing mining lots fails to post the notices required by section 7034, Revised Statutes, 1889, the lease will expire at the close of three years, and the subtenant who, during the currency of the three years, bought the landlord's title will take the same at the expiration of that time, free from the prior claim of the first tenant.

2. **Landlord and Tenant:** DISPUTING TITLE: ESTOPPEL. A tenant may not dispute his landlord's title at the commencement of the term, but may show that his interest has terminated by the efflux of time, and the fact that, by inadvertence or mistake of his rights, he may have paid rent for the expiration of leasehold, will not be construed into a continuance of the tenancy.

*Appeal from the Jasper Circuit Court.*—HON. W. M. ROBINSON, Judge.

REVERSED.

*Thomas & Hackney* for appellant.

(1) Neither J. R. Troup nor the Weston Land and Mineral Company, while the owner of the land in controversy, complied with the provisions of section 6441, Revised Statutes, 1879 (now section 7034, R. S. 1889); Revised Statutes, 1879, section 6442; Revised Statutes, 1889, section 7035; Session Acts, 1877, p. 313; *Desloge v. Pearce*, 38 Mo. 588. (2) The defendant company became the owner of the fee to the lots in controversy, February 8, 1889, by purchase from the Weston Land and Mineral Company (lessor of plaintiff and his associates); and, although at the time of this

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purchase the defendant was occupying the premises as the lessee or tenant of plaintiff under an oral contract, no term being specified, and occupied the premises thereafter; still, on the expiration of the plaintiff's three years' right or license, in April, 1889, the defendant company ceased to be the tenant of plaintiff, and its possession of the lots thereafter was that of owner of the fee instead of tenant of plaintiff; and it was not necessary for the defendant company to surrender possession of the premises to the plaintiff, nor to give the plaintiff any notice repudiating the tenancy after the expiration of his interest. 2 Herman on Estoppel and Res Judicata, sec. 871, pp. 998, 999; *Presstman v. Silljacks*, 52 Md. 647; *Shields v. Lozear*, 34 N. J. L. 496. (3) The defendant company is not estopped from showing that plaintiff's interest in, or right to, the lots in controversy expired by limitation or efflux of time subsequent to the leasing thereof by plaintiff and his associates, to Gray & Grounds or the defendant. *Meier v. Thieman*, 15 Mo. App. 307; *Chaffin v. Brockmeyer*, 33 Mo. App. 96; *Culverhouse v. Worts*, 32 Mo. App. 426; *Pentz v. Kuester*, 41 Mo. 449, 450; *Higgins v. Turner*, 61 Mo. 249; *Presstman v. Silljacks*, 52 Md. 647; *Lawson v. Clarkson*, 113 Mass. 348; 2 Taylor on Landlord and Tenant [8 Ed.], sec. 708; 2 Herman on Estoppel and Res Judicata, secs. 843, 858, 868, 871; 12 American and English Encyclopedia of Law, p. 706; see, also, cases cited in note to *Horner v. Leeds*, 2 Leading Cases in American Law, Real Property, by Sharswood and Budd, pp. 73, 74.

*E. O. Brown* and *J. H. Flanigan* for respondent.

The record in this case disclosed the existence of a contract between the parties so clearly, and the judgment of the trial court having been simply to uphold

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and sustain the contract, the respondent contents himself with calling the attention of the court simply to the following citations: "In leasing, paying rent and proposing to buy, the defendants admitted the capacity of plaintiff to lease lands in question. 2 Taylor's Landlord and Tenant, sec. 512." "If defendant treated plaintiff as its landlord by accepting lease, paying rent and the like, it is precluded from showing that he had no title at the time they paid rent, etc. *Ibid.*, section 705."

Gill, J.—Owing to the appearance in this record of so much immaterial matter, it is quite difficult to make a clear and yet concise statement.

The plaintiff sues the defendant, Troup Mining Company, for the rent or royalty alleged to be due him on two mining lots which he developed and which he subsequently let to the defendant; that the mining company occupied and worked the property during the period from July, 1889, to May, 1891, without paying the rent or royalty as agreed. Among the defenses relied on is, that plaintiff's interest in the lots expired in April, 1889, and that hence he is not entitled to anything because of minerals taken out after that date.

Eliminating much that is wholly immaterial, the facts necessary to be stated are as follows: In April, 1886, plaintiff registered as miner of lots 23 and 24 in a forty acres of land in the mineral region of Jasper county then owned by the Weston Land and Mineral Company. This corporation failed, however, to post up any printed statement of the terms and conditions upon which the land was to be mined, and the time during which the right to mine thereunder should continue, as required by the mining statute. Revised Statutes, 1879, section 6441, now section 7034, Revised Statutes, 1889. The plaintiff, after a limited develop-

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ment of the lots in 1887, rented the same to one Staggs, with a parol agreement by Staggs to pay a certain proportion of the minerals raised therefrom. Shortly thereafter, and in the same year (1887), Staggs, with plaintiff's consent, sold out to Gray & Grounds, who in the same year (1887), or first part of 1888, became, with some others, the defendant company. The defendant mining company worked the lots 23 and 24, as tenants under the claim of plaintiff, and paid the rent or royalty to July, 1889, when it refused to pay any further, assigning as a reason that plaintiff's interest in the lots had expired, and that no rents or royalty were due him. Defendant rests this claim—that plaintiff had ceased to have any further interest in the mining lots—on the fact that more than three years had expired since plaintiff entered upon the land for mining purposes, and that, by reason thereof, and the further admitted fact that plaintiff took his interest without any printed terms, etc., being posted by the owner of the land, the leasehold of the plaintiff expired in April, 1889 (which was three years from the time plaintiff entered on the land of the Weston Land and Mineral Company). It is also proper to state that in February, 1889, the defendant company bought and secured the conveyance of the fee to the forty acres wherein lies the two lots in controversy; and during the time for which plaintiff's rent is claimed the defendant asserts a right because of its absolute ownership of the land and not as plaintiff's tenants.

A trial was had by the court below sitting as a jury, and from a judgment for $1,388.59 in plaintiff's favor defendant has appealed.

Upon a careful consideration of the law and facts of this case we fail to discover any correct theory that will sustain the judgment. We have in this state a special statute applying to these mining matters. By

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section 7034, Revised Statutes, 1889, it is provided that: "When any person owning real estate in this state * * * shall permit any person or persons, other than their servants, agents or employees, to enter and dig or mine thereon for lead, ore or other minerals, with the consent of such owner or owners * * * he or they shall keep a printed statement of the terms, conditions and requirements upon which such lands may be mined or prospected, and the *time during which the right to mine or prospect thereunder shall continue*, posted or hung up in a conspicuous place, in plain, legible characters, in the principal office or place of business of such person or company in the county in which said lands are situated," etc. * * *

And by section 7035 it is, in effect, provided that if such owner of mining lands permit others to enter upon the same and in good faith to dig or open up any shafts, mines or quarry, etc., "but without such owner complying with the provisions of section 7034" (that is by posting up the terms, etc., and reciting therein the time such miners may continue), then such miners "shall have the exclusive right as against such owner giving such permit or consent, and against any person claiming by, through or under such owner, to continue to work, mine, dig, etc., * * * in said real estate, with the right of way over such lands for the purpose of such mining, *for the term of three years from the date of the giving such consent or permit*," *provided*, however, that, if such persons mining as aforesaid fail or neglect to work such shafts, mines, etc., for ten days in any one month, then they shall forfeit the right so to do, etc.

When, now, plaintiff Robinson, in April, 1886, entered upon this mining property, then owned by the Weston Land & Mineral Company, and proceeded to work thereon, the said company had failed to post the

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printed statement of terms, etc., as required by section 7034, and, therefore, plaintiff's right to the use and possession of said mining lots became fixed by the terms of section 7035. The matter then stood, and the rights of the parties occupied the same attitude, as though there had existed a written contract or agreement between the parties conforming to the terms of said section. Robinson had thereby the right to use and occupy the land for mining purposes for the period of three years and no longer; and in return therefor he was to pay the rent or royalty in said section provided. The plaintiff's tenancy then became fixed, and definite as to time, and expired, as if by an express stipulation, in April, 1889, three years from the time he entered by the consent of said Weston Mining Company.

Plaintiff then having this interest in the nature of a leasehold estate for the fixed term of three years, expiring in April, 1889, sublet the same to the defendant company in the latter part of 1887. This was a parol contract with no definite time named, but as the plaintiff's term would expire in April, 1889, his subtenant could not claim beyond that date. Before the expiration of plaintiff's three-year term, that is on February 8, 1889, the defendant mining company purchased from the Weston company the entire reversion, the fee of the land. When, then, plaintiff's particular estate was determined in April, 1889, the reversionary interest then held by the defendant company was the whole estate, and it had the undoubted right to hold and use and enjoy the same free and unincumbered of the prior claim of the plaintiff.

While now the tenant will not be permitted to set up that his landlord had no title when the tenancy commenced, he may yet show that the interest of the landlord as it then existed had terminated as by efflux

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of time, etc. *Meirer v. Theimann*, 15 Mo. App. 307, and cases cited at page 310; 2 Herman on Estoppel, sec. 868, etc.; 2 Taylor's Landlord and Tenant [8 Ed.], sec. 708.

And that was the extent of the defense here. The defendant mining company did not dispute the title of the plaintiff at the time he let this property; but it was shown beyond question that before the period for which rent is claimed in this action the plaintiff's interest had expired; that when he rented the property to defendant he had only an unexpired leasehold terminating by its very terms several months before the time for which he now claims rent.

That the defendant inadvertently, or by mistaken notion of its legal rights, may have paid to plaintiff rents after the expiration of his leasehold, or may have offered to purchase any rights or claims which the plaintiff asserted to the mining lots, cannot be construed into a continuance of the tenancy. As well said by defendant's counsel, plaintiff was not thereby induced to part with anything or to alter his position in any respect; he lost nothing by defendant's mistakes; he simply received rents for about three months to which he was not entitled.

The judgment will be reversed. All concur.

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A. Huiser, Appellant, v. A. W. Beck, Defendant. Potter and McCracken, Interpleaders and Respondents.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Chattel Mortgages:** DELIVERY. The infallible test of delivery is the fact that the grantor has divested himself of all dominion and control over the conveyance, as he appears to have done in this case.

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2. ———: RECORD: ATTACHMENT: PRIORITY. An attachment levied prior to the recording of a previously given chattel mortgage, will not take precedence of such, mortgage. Authorities and statute discussed.

3. ———: ATTACHMENT: INTERPLEADING. The seizing of mortgaged property under an attachment and removing it, gives the mortgagee an option to take it into his possession, which he may exercise by interpleading in to the attachment.

4. **Attachment**: INTERPLEA: REPLEVIN. An interplea in an attachment is in the nature of a replevin and engrafted thereon by the statute.

*Appeal from the Vernon Circuit Court.*—HON. D. P. STRATTON, Judge.

AFFIRMED.

*Burton & Wight* and *Geo. Walshe* for appellant.

(1) There was no delivery of the mortgage by Beck to interpleaders. *Turner v. Carpenter et al.*, 83 Mo. 333; *Clemence Ells et al. v. Railroad*, 40 Mo. App. 165; *Huey v. Huey*, 65 Mo. 689; *Miller et al. v. Lullman, adm'r, et al.*, 81 Mo. 311; *Hammerslough v. Cheatham et al.*, 84 Mo. 13; *Scott et al. v. Scott*, 95 Mo. 300. (2) Even though delivered, not having been put upon record until after the levy of the writ of attachment, it was of no validity against said writ. Revised Statutes, 1889, sec. 5176; *Rawlins v. Bean et al.*, 80 Mo. 614; *Bevans v. Bolten et al.*, 31 Mo. 437; *Wilson v. Milligan*, 75 Mo. 41. (3) The *semble* of Judge Scott, in *Bryson & Hardin v. Penix*, 18 Mo. 13, to the effect that the mortgage, if recorded in a reasonable time after its execution, would be valid against a creditor or purchaser, is: *First.* A mere *dictum;* the question does not arise in the case. *Second.* The authority quoted (4 Kent. 458) is not applicable, as it relates to a mortgage of real estate. *Third.* The supreme court in *Wilson v. Milligan*, 75 Mo. on page

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42, refuses to sanction the doctrine, virtually overruling it. *Fourth.* The *semble* is in conflict with the statute and the logic of the authorities quoted in point 2. *Fifth.* *Way v. Braley*; Hawks & Glover, interpleaders, 44 Mo. App. 457, for the same reasons, is not the law. (4) The testimony of Hart shows that the note to him was still due and unpaid at the time of the trial; that the interpleaders had paid him nothing. Hence interpleaders were premature. *Booger v. Langenberg*, 42 Mo. App. 7; *Chandler v. West*, 37 Mo. App. 631; *Stonebreaker et al. v. Ford et al.*, 81 Mo. 532, and cases cited.

*G. S. Hoss*, *H. H. Blanton* and *J. B. Johnson* for respondents.

(1) There was sufficient delivery of the deed from Beck to interpleaders. Washburn on Real Property [3 Ed.], top p. 254, sec. 20*a*; p. 259, sec. 28; *William v. Latham*, 113 Mo. 165, bottom p. 173, and authorities cited in the opinion. Beck surrendered all dominion over the deed when he delivered the same to Mosier. (2) The record of the mortgage was in time to defeat the attachment. *Way v. Braley*, 44 Mo. App. 457. (3) Although apparently in the face of the general understanding of the profession, yet we submit that in the absence of fraud of any kind a chattel mortgage recorded any time before sale under attachment proceedings will defeat the attachment lien; this is the logic of *Davis v. Owensby*, 14 Mo. 170, and the line of decision following and approving the same in our supreme and appellate courts. (4) Section 5176, Revised Statutes, 1889, concerning chattel mortgage, uses the same language as section 2420. *Ibid.*, concerning conveyances of real estate, an attaching creditor is not a purchaser. *Bank v. Hughes*, 10 Mo. App.

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16; second paragraph on said page. (5) Section 5178, Statutes, 1889, does not apply to mortgages. *Raeder Bros. v. Brewing Co.*, 33 Mo. App. 69. (6) Under the safety clauses in the mortgage the interpleaders were not premature in their action. *Hall v. Sampson*, 91 Am. Decisions, p. 56; Cobby on Replevin, sec. 191 *et seq.*; *Bank v. Abernathy*, 32 Mo. App. 211; next to last paragraph in opinion on rehearing, page 227.

Smith, P. J.—The appellant in this appeal was the plaintiff in an action of attachment brought by him against one Beck. The sheriff, under the writ of attachment, at three o'clock, p. m., on November 19, 1891, levied upon twenty head of steers as the property of Beck. At the return time of the writ, Potter and McCracken interpleaded in the cause, claiming to be the owners of the steers levied on.

At the trial the interpleaders had judgment, and the plaintiff, in the attachment suit, has appealed from that judgment.

The attachment plaintiff, by his appeal, questions the propriety of the action of the trial court in refusing to declare, as it was asked to do, that upon the evidence the interpleaders were not entitled to recover upon three distinct grounds, the first of which is that there was no delivery of the chattel mortgage, under which interpleaders claim, by Beck, the mortgagor, to them. As a matter of course, if there was no delivery of the mortgage, the judgment must be reversed; but was there not a sufficient delivery?

It appears from the undisputed evidence that Beck promised the interpleaders that if they would become his surety on a note for $100 to one Hart, that he would give them a chattel mortgage on the twenty head of steers. That thereupon interpleaders signed the note. That two days thereafter Beck went to Moseir,

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a neighboring justice of the peace, and stated the circumstances of the interpleaders having become his sureties, and requested that he draw up a mortgage on the twenty head of steers to secure them. The mortgage was accordingly prepared by the justice, signed and acknowledged by Beck. It appears that neither party knowing Hart's given name, the same was left blank in the mortgage. The justice, Moseir, testified that, after the mortgage was executed, as already stated, he said to Beck, "You take this down to Potter as you go by and if he knows Mr. Hart's name he will put it in." Beck replied, "No, I will leave it with you. Potter told me to leave it with you and he would call for it." He further testified that, "Beck told me that he would tell Potter to come and get it." The interpleaders did not know the mortgage had been executed until the nineteenth of November, 1891, when Moseir sent it to interpleader, Potter, who, that same day, caused it to be recorded.

The infallible test of a delivery is the fact that the grantor has divested himself of all dominion and control over the conveyance. *Henry v. Henry*, 65 Mo. 689. In *Hammerslough v. Cheatham*, 84 Mo. 13, it was ruled that to constitute a delivery of a deed by placing it in the hands of a third party it must be done with the intent on the part of the grantor that it should take effect as his deed in favor of the grantee. It must be so held by the third party as to be beyond the control and right of dominion of the grantor." And a similar statement of the rule has been made in other cases: *Ells v. Railroad*, 40 Mo. App. 165; *Turner v. Carpenter*, 83 Mo. 333; *Williams v. Latham*, 113 Mo. 165; *Miller v. Lullman*, 61 Mo. 311; *Scott v. Scott*, 95 Mo. 300.

We think there was a delivery of the mortgage within the meaning of the above recited rule. Beck

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left it with Moseir for the interpleaders. He thereby parted with all dominion and control over it. It is unimportant whether the interpleaders called on Moseir for it or whether he sent it to them. There is nothing in the evidence negativing the intention by Beck to irrevocably part with the control and dominion over the mortgage after it was executed and left by him with Moseir with directions to deliver it to the interpleaders.

The appellants' second objection is that, even though the mortgage was executed and delivered before the levy of the writ of attachment it was not recorded by the recorder until after the writ was levied, and therefore it was invalid as against the writ.

The question thus presented depends for its solution upon the construction to be given to section 5176 of the statute. *Bryson v. Penix*, 18 Mo. 14, was where there was a senior and junior mortgage given to different mortgagees on some beef cattle. The senior mortgage was not filed for registry until four days after its execution and not until after the filing of the junior one. The cattle were sold and the proceeds thereof were paid over to the junior mortgagee, to recover which the senior mortgagee brought a suit on which he failed. The case was taken to the supreme court, where the judgment was affirmed. In the opinion disposing of the case by Judge Scott in what seems to us to be an *obiter dictum*, it is stated that, "Our statute prescribes no time within which a deed or conveyance shall be recorded. Under such circumstances a party must have a reasonable time for that purpose; and when a deed is recorded within a reasonable time it has relation back to the time of its execution." It was then stated that the question was not raised in the case so the judgment of the lower court was affirmed.

In *Wilson v. Milligan*, 75 Mo. 41, the rule



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announced by Judge Scott in the preceding case is followed by the judge who wrote the opinion in the case, though without giving it his sanction. The question was not, as appellant supposes, considered in either *Bevans v. Bolton*, 31 Mo. 437, or in *Rawlings v. Bean*, 80 Mo. 614. But in *Way v. Braley*, 44 Mo. App. 457, the exact question was presented and decided by the St. Louis court of appeals. The rule announced in *Bryson v. Penix* and followed by *Wilson v. Milligan*, *supra*, was there again recognized and applied.

But for these adjudications, which must control our decision of the question under consideration, we should not have thought that by any fair construction of the statute, section 5176, the interpellation of this rule into it was warranted. We are therefore constrained to rule that defendant's second ground of objection to the sufficiency of the evidence is not well taken.

The appellant's third and last objection is, that the interpleaders were premature in interposing their claim to the property, or, what is the same thing, to the proceeds of the sale thereof in the hands of the sheriff. The mortgage contained a clause to the effect that: "The property hereby sold and conveyed, to remain in his possession until default be made in the payment of the said debt and interest or some part thereof; but in case of sale or disposal or attempt to sell or dispose of said property, or a removal or attempt to remove the same from the premises of the said A. W. Beck without the consent of the parties of the second part, or an unreasonable depreciation in the value thereof, the said H. D. Potter and James McCracken, or their legal representatives, may take the said property in their posssession," etc., etc.

The action of the sheriff in seizing the mortgaged property and removing it gave the interpleading mort-

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gagees an option to take it into their possession, which they might exercise if they saw fit by interpleading in the attachment. *Kennedy v. Dodson*, 44 Mo. App. 550; *Bank v. Metcalf*, 29 Mo. App. 384; *Brown v. Hawkins*, 54 Mo. App. 75; *Leaman v. Paddock*, 55 Mo. App. 296.

An interplea in an attachment is in the nature of a replevin engrafted thereon by statute. *Spooner v. Ross*, 24 Mo. App. 599; *Hellman v. Pollock*, 47 Mo. App. 205.

It results from these observations that the judgment must be affirmed. All concur.

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## First National Bank of Fort Scott, Kansas, Appellant, v. J. W. Lillard, Respondent.

**Kansas City Court of Appeals, January 8, 1894.**

1. **Banks and Banking:** TRIAL PRACTICE: INSTRUCTIONS: EVIDENCE: NEGLIGENCE. It is error to instruct a jury as to the effect of negligence of a banker in accepting a note with a forged signature when there is no evidence showing such negligence.

2. **Principal and Surety:** NEGLIGENCE OF PAYEE: DISCHARGE OF SURETY. If the payee causes the surety to forego security when he would have taken it, the surety is released, without regard to the care or negligence exercised by the payee.

3. ———: DISCHARGE OF SURETY: EVIDENCE. The act of the payee that discharges the surety must be one that causes the surety to forego an indemnity he *would* have taken, and there should be evidence that he *would* have taken such security but for the act of the payee.

*Appeal from the Vernon Circuit Court.*—Hon. D. P. Stratton, Judge.

*Burton & Wight* for appellant.

(1) Plaintiffs were not guilty of any negligence in accepting notes three and four, because the signatures

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of J. W. Lillard and Willis Hughes thereon were so like their genuine signatures that it was impossible to tell the difference. Because plaintiffs were not required to go out and ascertain the genuineness of signatures. Plaintiff is entitled to recover upon the note sued on. *White v. Middleworth*, 42 Mo. App. 368; *Allbright v. Griffin*, 78 Ind. 182; *Hubbard v. Hart*, 71 Iowa, 668; *Kirby v. Landes*, 54 Iowa, 150; *Morkle v. Hatfield*, 3 Am. Dec. 446; *Bank v. Smith*, 13 Am. Dec. 37. (2) Instruction number 1 given for defendants was erroneous, because it permitted the jury to determine, as a matter of law, what acts of plaintiff were negligent; because, there being no dispute as to the facts, and there being no inference of negligence therefrom, it was the duty of the court to so declare. *Barton v. Railroad*, 52 Mo. 253; *Bell v. Railroad*, 72 Mo. 50; *Gourley v. Railroad*, 25 Mo. App. 144.

*M. T. January* and *Hoss & King* for respondents.

At this time it is apparent upon inspection that the second count of defendant's answer is faulty in this, that it combines two separate and distinct defenses, namely: *First*. Negligence of the bank in accepting the forged renewal notes. *Second*. Estoppel in *pais*—stamping the note in suit "paid" with the bank stamp, and thus furnishing the means to J. F. Lillard to deceive his sureties to their damage. However, objection was not taken on this point by plaintiff, but an issue of facts is squarely presented in the reply involving both defenses and the instruction given at defendant's request fairly presents both questions to the jury.

STATEMENT.

The following statement is sufficiently accurate, from which may be ascertained some of the main features of the case: The plaintiff is a national bank at Fort Scott,

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Kansas. Jas. F. Lillard, J. W. Lillard and Willis Hughes, now deceased, were residents of Vernon county, Missouri, living some eight or ten miles from Fort Scott. In February, 1889, Jas. F. Lillard applied to plaintiff for a loan. He offered as securities J. W. Lillard and Willis Hughes. A note was made out, dated February 20, 1889, for $1,200, payable in ninety days, and delivered to Jas. F. Lillard, who returned it signed by himself, J. W. Lillard and Willis Hughes, and received the money upon it, less discount.

Prior to that Jas. F. Lillard and Willis Hughes had done business with plaintiff, and plaintiff's officers were familiar with their signatures. J. W. Lillard had not been a customer of plaintiff's, but plaintiff had frequently cashed his checks on other banks, and its officers were familiar with his signature. When that note became due, Jas. F. Lillard renewed it by giving a second note, dated May 21, 1889, for $1,250, signed by himself, J. W. Lillard and Willis Hughes, and payable in ninety days. The first note was then stamped "paid" upon its face and surrendered to Jas. F. Lillard. When the second note became due, Jas. F. Lillard renewed it by giving a third note for $1,300, dated August 19, 1889, payable in ninety days, signed by himself, and *purporting to be signed by J. W. Lillard and Willis Hughes*, and said second note was stamped "paid" upon its face and delivered to Jas. F. Lillard.

When the third note was due Jas. F. Lillard paid thereon a sum sufficient to reduce the debt to $1,100, for which he gave a fourth note, dated November 17, 1889, payable in ninety days, and also purporting to be signed by J. W. Lillard and Willis Hughes. The signatures of J. W. Lillard and Willis Hughes to the third and fourth notes were counterparts of their genuine signatures, and were accepted by plaintiff just as the genuine one preceding had been.

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When the fourth note became due Jas. F. Lillard called at plaintiff's bank, left with plaintiff the amount of the discount, and took away a fifth note, which he agreed to have signed by the same securities. He never returned, but in a few days left the country, and has never been heard of since. Some time after he had gone, plaintiffs learned of his leaving and sent word to J. W. Lillard and Willis Hughes that the fourth note was due and asking them to call and pay it. In response to that notice J. W. Lillard and Roland Hughes called at plaintiff's bank and examined the fourth note, but *did not inform plaintiff that it was a forgery.*

When Jas. F. Lillard left, which was on the nineteenth of February, 1890, he was a defaulter as tax collector and J. W. Lillard and Willis Hughes were on his bond. He was also owing a note to one Hughes, of Ray county, on which note J. W. Lillard was security. Attachment suits were brought by his bondsmen, and by Hughes, of Ray county, and all of Jas. F. Lillard's property was seized and sold under the attachments, and the proceeds paid to said bondsmen and Hughes.

In April, 1891, plaintiff brought suit in Vernon county circuit court on the fourth note, and then learned that J. W. Lillard's and Willis Hughes' signatures thereon were forgeries. Thereupon on October 30, 1891, plaintiff brought this suit on the second note. Defendants admit its execution, but allege negligence on the part of plaintiff in accepting the third and fourth notes, and in not notifying defendants. There was evidence tending to show that between the time of the second genuine note (the one in suit) was due and the departure of Jas. F. Lillard he had ample property out of which the amount of such note could have been made; but that at the time of his departure he was insolvent.

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Ellison, J.—Under the theory upon which the parties tried this cause and the instructions of the court the verdict was for defendants. We have in the first instance examined the case from the standpoint of the theory upon which it was tried and have concluded that the judgment should be reversed and the cause remanded. That theory was based upon negligence in the plaintiff bank in taking the third note (the first forged note) in payment of the second genuine note and stamping the latter as paid. The whole negligence must, however, be based on the negligent acceptance of the forged note in payment of the genuine, since marking it paid is but the result of this. The court instructed the jury, at the instance of the defendants, on the hypothesis of such negligence. In order to justify such instruction there should have been some evidence tending to prove the negligence thus instructed upon. Now, from the record here there does not appear a syllable of such testimony. On the contrary the testimony on the part of plaintiff shows, without pretense of contradiction, that the signatures to the forged note were exactly like those to the genuine note and that they could not be distinguished. Nor was there any evidence upon which the idea could be based that it was negligence in plaintiff in not inquiring whether the signatures of these sureties were genuine when the genuine note was surrendered and stamped, "paid." In this respect, also, there was abundant affirmative testimony on the part of plaintiff that rebutted such proposition.

Since the case is to be retried it is proper to add the following: We have not been able to see what bearing any question of plaintiff's negligence can have on the case. If plaintiff's act in surrendering the note to the principal debtor cancelled and marked paid, caused these surety defendants to *forego* or *forbear*

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securing or indemnifying themselves from the principal debtor, in consequence of which forbearance they have lost available recourse on him by reason of his insolvency, then they are discharged, regardless of any negligence on the part of plaintiff. If the plaintiff has thus caused them to forego taking security or indemnifying themselves when they otherwise would have done so, then in such case plaintiff's utmost care and prudence would be no answer to the injury done the sureties. Both parties in such case are innocent, but plaintiff is the party, notwithstanding, who caused the injury and must be the one to bear the burden of such injury.

We have had occasion to pass upon the general proposition of law as to the release of sureties under kindred conditions to those now presented. We here state what we understand it to be. When a creditor who knows that one occupies the relation of surety to the principal debtor notifies such surety that the debt is paid, or cancels the debt, the surety being apprised thereof, and in consequence of such notice or cancellation changes his situation, as by surrendering security, or refraining from taking security which he could have taken *and which he otherwise would have taken*, he is discharged. *Triplett v. Randolph*, 46 Mo. App. 569; *Driskell v. Mateer*, 31 Mo. 325; *Carpenter v. King*, 9 Met. 517. In *Triplett v. Randolph*, the act of the plaintiff caused the sureties "to forego" securing themselves. That is, *the act* of the plaintiff *caused* them not to secure themselves—was the reason why they did not. So the same may be said of *Carpenter v. King*.

In the case at bar there is evidence tending to show that defendants could have secured or indemnified themselves at the time the genuine note became due and for a period thereafter; but there is no evidence

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whatever that they *would have done so, had it not been for the fact of seeing the note marked paid in the hands of their principal.* If any inference at all is to be drawn from this branch of the case as it now appears in the the record, it is that they would not have done so. They had been the sureties for this principal at other times and in other relations; and during a time, too, when one of them, at least, knew of his unsteady character and unbusinesslike habits. Conceding that if defendants had known that the note had been taken up by giving another with their names forged thereto they would have brought matters to an immediate adjustment, yet it must be remembered that they got no such information from plaintiff's act in surrendering and cancelling the note; which act is all that gives them standing in court. The real question is, could they *and would* they have secured, or, otherwise indemnified themselves, if they had not been led to believe that the note had been paid off and discharged and the matter of forgery was outside the case, except for the purpose of avoiding the cancellation of the note in suit. As before stated, the evidence tends to show they could, but does not tend to show that they would. The latter showing is the very essence of the case. It may be that, if plaintiff had not cancelled the note, these defendants would have made no inquiry or effort concerning it. We are, of course, uninformed what they would have done.

The judgment is reversed and the cause remanded. All concur.

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# INDEX.

BY DAVID GOLDSMITH.

ACCOUNTING.

INSUFFICIENCY OF PLEADINGS AND EVIDENCE.—The petition and the evidence in this cause are considered; the former is *held* not to state, and the latter not to establish, a case entitling the plaintiff to an accounting with respect to the profits of a speculation, into which the plaintiff and one of the defendants had jointly ventured. *Wetmore v. Crouch, 441.*

ACCOUNT STATED.

BUILDING CONTRACT.—When the parties to a building contract have agreed upon the amount due for a specific portion of the work, and the one who owes the amount thus agreed upon has paid it in accordance with the terms of the settlement, the other is debarred from making any further claim for the work. *Dengler v. Auer, 548.*

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4. ——— RENTS.—For rulings on effect of sale of reversionary estate in land by administrator on rents, see *Page v. Culver, 606.*

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2. ——— ACTION BY CITY OF ST. LOUIS FOR ENFORCEMENT OF MUNICIPAL ORDINANCE.—The supreme court has exclusive appellate jurisdiction of every cause wherein a political subdivision of the state is a substantial party, and, therefore, of an action by the city of St. Louis to recover a penalty or fine for the violation of one of its ordinances. *City of St. Louis v. Robinson, 256.*

3. ——— TITLE TO OFFICE—SCHOOL COMMISSIONER.—In an action involving the title to the office of county school commissioner, the supreme court, and not the court of appeals, has appellate jurisdiction. *State ex rel. Wood v. Meek, 292.*

4. ——— CONDEMNATION PROCEEDING—TITLE TO LAND.—A proceeding to condemn land for a railroad right of way involves title to real estate, and the supreme court has exclusive appellate jurisdiction and is required to exercise exclusive superintending control over the trial court in such causes. *Chicago Santa Fe & California R'y Co. v. Eubank, 335.*

ASSIGNMENT.

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2. ——— ASSIGNABILITY OF CONTRACT RIGHTS.—A contract, which stipulates for the support of a newspaper for a publication, does not rest on a personal confidence. The owners of the newspaper may therefore assign their rights under it to a corporation formed to conduct the newspaper. *Ib.*

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. ASSIGNMENT BY ONE OF SEVERAL PARTNERS.—Though one partner is not authorized, by virtue of the partnership relation alone, to make a voluntary assignment for the firm, yet he may do so with the express assent and direction of the other members; and the other partners alone have the right to complain of such assignment, and not firm creditors. *Rock Island Plow Co. v. Lang & Gray, 349.*

2. FILING OF DEED—ATTACHMENT.—A plaintiff in an attachment instituted and tried after the execution and delivery of the deed of assignment and the possession of the assignee thereunder, but before it is filed for record, does not acquire a right superior to the assignee. *Ib.*

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ATTACHMENT. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 2.

1. ATTACHMENT IN ACTION EX DELICTO.—The Missouri statute furnishes a remedy by attachment in all civil actions, whether resting on contract or sounding in tort. *Pearson v. Gillett, 312.*

2. DEBT FRAUDULENTLY CONTRACTED.—The conversion of money, though fraudulent on the part of the tort feasor, will not constitute a fraudulent contraction of a debt within the purview of the statute defining the grounds of attachment. *Sunday Mirror Co. v. Galvin, 412.*

3. INTERPLEA—NATURE OF PROCEEDING.—An interplea is an attachment is in the nature of a replevin and engrafted thereon by the statute. *Huiser v. Beck, 668.*

4. SAME.—The seizing of mortgaged property under an attachment and removing it, gives the mortgagee an option to take it into his possession, which he may exercise by interpleading in the attachment. *Ib.*

5. INTERPLEA—JURISDICTION OF JUSTICE'S COURTS.—Where a justice acquires jurisdiction of an attachment proceeding, he also has jurisdiction to hear and determine an interplea for the attached property, although such property exceeds in value the amount fixed by statute as the limit of justice's jurisdiction, such interplea being an incident growing out of the principal action. *Springfield, etc., Co. v. Glazier, 95.*

6. ——— NATURE OF ISSUE.—On an interplea for property seized in attachment, the only issue to try is whether the attached property is the interpleader's or not, and an instruction as to the value of such property is error; and on a finding for the interpleader the court should adjudge the fund in its custody, arising from the sale of the property, to the interpleader. *Ib.*

7. SAME.—An instruction directing the jury to find for the interpleader for such of the property, sold under attachment, as they believe to be included in his mortgage is affirmed. *Ib.*

8. EFFECT OF RECOVERY OF JUDGMENT ON LIEN OF ATTACHMENT. When the plaintiff in a suit by attachment recovers judgment, the lien of the judgment merges that of a levy of the writ of attachment on land, subject to the doctrine of relation in the determination of priorities. Accordingly, the lien of such levy is lost, if the lien of the judgment is allowed to expire by limitation. *Green v. Dougherty, 217.*

9. RIGHTS OF ATTACHMENT CREDITOR.—The defense of usury is a personal privilege of the debtor, his privies in representation, in blood or in estate, as his vendee, execution creditor, or, as in this case, his attachment creditor who may defend against his debtor's mortgage on the ground that it secures usury, as provided in section 2, page 171, Laws, 1891. *American Rubber Co. v. Wilson, 656.*

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10. ——— PRIORITIES.—An attachment levied prior to the recording of a previously given chattel mortgage, will not take precedence of such mortgage. Authorities and statute discussed. *Huiser v. Beck, 668.*

11. ACTION FOR MALICIOUS ATTACHMENT—PLEADING—AIDER BY VERDICT. The petition in an action for malicious attachment must allege either that the attachment proceeding has terminated in favor of the attachment defendant, or that it has terminated against him and that he had no opportunity to defend against it; nor is the want of such allegation cured by verdict. *Freymark v. McKinney Bread Co.*, 435.

12. ——— NATURE OF THE ACTION.—*Held*, in the course of discussion, that the dissolution of the attachment is not sufficient in itself to sustain an action for malicious attachment by the attachment defendant; that the basis of such action is malice and the want of probable cause; and that the issue as to the want of probable cause is whether the acts and conduct of the attachment defendant were such as to warrant the belief that attachment would lie. *Ib.*

ATTORNEYS. See ADMINISTRATION, 1, 2.

BANKS.

1. NEGLIGENCE IN FAILING TO COLLECT DRAFT—LAW AND FACT. Whether conduct amounts to negligence is a question of law, when the facts are not in dispute and but one inference can reasonably be drawn therefrom. This rule is applied to the failure of a bank to either collect a draft received by it for collection, or to notify the drawer of its nonpayment in due time. *Selz v. Collins, 55.*

2. SAME.—But whether the drawer, in the case of such negligence on the part of a bank, is entitled to a verdict for the full amount of the draft is *held* under the evidence in this cause to be a question of fact, dependent upon the probability of the collection of the draft if the bank had used due diligence in pressing the drawee for payment, or in notifying the drawer of the nonpayment of the draft. *Ib.*

3. SAME—CUMULATIVE REMEDIES.—In the case of such negligence, the drawer can prove his claim against the drawee under an assignment for the benefit of creditors, made by the latter, and collect dividends thereon, and can at the same time pursue his right of action for the negligence of the bank; these remedies are cumulative. Nor need the prosecution of his suit against the bank be delayed to await the outcome of the assignment. *Ib.*

4. BREACH OF PROMISE TO PAY CHECK—NATURE OF ACTION.—The petition charged the breach of a parol promise to pay a check, and that plaintiff was induced thereby to sell certain cattle to L. and receive in payment said check, which defendant refused to pay, to plaintiff's damage, etc. *Held*, the action was *ex contractu*, since there is no allegation of fraud or deceit. *Nichols v. Bank, 81.*

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5. ACTION FOR NEGLIGENCE—INSTRUCTIONS.—It is error to instruct a jury as to the effect of negligence of a banker in accepting a note with a forged signature when there is no evidence showing such negligence. *First Nat. Bank v. Lillard, 675.*

6. FRAUDS AND PERJURIES—ORIGINAL PROMISE—COLLATERAL PROMISE—ESTOPPEL.—The evidence in this case is reviewed and it is *held:*

(1) That the representations of defendant's cashier did not constitute an unconditional promise, but a mere expression of opinion.

(2) Nor were they an original promise that would bind the defendant.

(3) But if such representation amounted to a promise at all, it was in its nature collateral and within the statute of frauds.

(4) That the check in question was an inland bill of exchange and a promise to accept it must be in writing.

(5) That plaintiff's case did not come within the provisions of section 723, Revised Statutes, 1889.

(6) That the words and conduct of defendant's cashier could not operate as an estoppel *in pais,* as one cannot invoke the doctrine of estoppel to validate a promise which the statute declares absolutely void. *Ib.*

BENEFIT SOCIETIES.

1. NATURE OF INSURANCE AFFORDED.—A benefit certificate differs from an ordinary policy of life insurance, in that it speaks with reference to the conditions existing at the death of the member whose life has been insured by it. *Order of Railway Conductors v. Koster, 186.*

2. ——— DESIGNATION OF BENEFICIARY.—Accordingly, when the *status* of the beneficiary under such certificate is the main, if not the sole, inducement to the insurance,—as where the certificate is in favor of the wife of the insured, and she is designated mainly by that relationship—the rights of such beneficiary lapse, if that *status* does not exist at the time of the death of the insured. *Ib.*

3. ——— INSURABLE INTEREST OF BENEFICIARY.—And when the laws of the benefit society stipulate that the beneficiary must have an insurable interest in the life of the insured member, that interest must exist at the death of such member. Accordingly, a divorced wife who has remarried, and moreover has no living issue by the insured member, is not under such laws entitled to the benefits. *Ib.*

4. CONSTRUCTION OF CERTIFICATE OF INSURANCE.—A benefit certificate provided on stipulated conditions for the payment to the holder of a sum of "not exceeding $1,000," but contained no other pro-

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vision for the determination of the amount of the liability; nor did the constitution or by-laws of the benefit society help out the certificate in this regard. *Held*, that the certificate entitled the holder to the full amount named, to-wit, $1,000. *Robyn v. Supreme Sitting, Order of Iron Hall, 198.*

5. INADEQUACY OF CONSIDERATION FOR BENEFITS CONTRACTED FOR. The certificate provided for the payment of said sum at the end of seven years, and required as a condition thereto that the holder of it should pay the benefit society such assessments as might be made during that period. The assessments made by the society during these seven years against the holder of the certificate amounted to only $351. *Held*, that this fact could not operate in reduction of the claim under the certificate. *Ib.*

6. LEGALITY OF BENEFITS.—The charter of a benefit society set forth that one of the objects of the association was to afford relief, comfort and protection to members, and empowered the association to make by-laws to carry out those objects. *Held*, that the adoption of a by-law for the payment of benefits to defray the funeral expenses of members and of their wives was authorized thereby. *Lysaght v. St. Louis, etc., Ass'n, 538.*

7. GARNISHMENT—ASSESSMENTS BY BENEFIT SOCIETY.—An assessment made by a benefit society against a subordinate lodge reached the hands of the treasurer of the lodge, whose duty it then was to immediately forward the fund to the treasurer of the society; nor did the lodge thereafter, under its own laws or those of the society, have any control over the fund. *Held*, that the fund was subject to garnishment under a writ of attachment against the society, notwithstanding that the lodge had directed its treasurer not to forward, but to hold, the same, owing to the failing condition of the society. *Collins v. Kammann, 464.*

BILLS OF EXCHANGE. See BANKS, 5; NEGOTIABLE PAPER, 1 and 2.

BOARD OF EQUALIZATION. See Taxes, 1 to 3.

BONDS. See PRINCIPAL AND SURETY.

BREACH—RENDERING IMPOSSIBLE TO PERFORM—DAMAGES.—The principle, that a party to a contract may breaking it by rendering the performance of its condition impossible, is applied to a recognizance given on a temporary stay of execution, and it is *held*, that where the principal in such obligation suffered the property seized under such execution to be subsequently sold under an execution enforcing a prior lien, thereby rendering it impossible to turn out the property to satisfy the execution upon the dissolution of the stay order, he suffered a breach of his bond, and he and his sureties would be compelled to perform the other alternative of their obligation, to-wit, pay the debt and costs to be recovered by the execution, and even if it was impossible to render said property in

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execution at the time the recognizance was entered into, still it remained for them to pay the debt and costs; and in this case the terms of the contract fixed the measure of damages. *Seaman v. Paddock*, *296*.

BURDEN OF PROOF.

INSTRUCTION. The burden of proof is not affected by evidence of facts which establish a *prima facie* case. It remains the same throughout the case; and, notwithstanding such *prima facie* case, the jury may accordingly be instructed that it is on the party who has it at the outset. ***Marshall Livery Co. v. McKelvy, 240.***

CHECKS. See BANKS, 5.

CHATTEL MORTGAGE.

1. DELIVERY.—The infallible test of delivery is the fact that the grantor has divested himself of all dominion and control over the conveyance, as he appears to have done in this case. ***Huiser v. Beck, 668.***

2. DELIVERY TO AGENT.—A delivery to a third person for the mortgagee's use is a good delivery, if accepted by the mortgagee; and delivery to an agent is as effective as delivery to the mortgagee. *Springfield, etc., Co. v. Glazier, 95.*

3. INSUFFICIENCY OF DESCRIPTION OF PROPERTY—DELIVERY.—Though the description in a chattel mortgage be insufficient, yet if possession is delivered to the mortgagee before the rights of third parties attach, they can take no advantage of the faulty description, as delivery cures such defects. *Ib.*

4. DESCRIPTION—GROWING CROP.—A description in a chattel mortgage, calling for seventy acres of growing corn, raised by the mortgagor on his farm in section 35, will not cover corn raised by him on an adjoining rented farm in the same section; nor is parol evidence admissible to show the mortgagor intended to include the corn on the rented place. ***Mayer v. Keith, 157.***

5. SAME.—Such description is not of that grade of sufficiency as to enable third parties, after reasonable inquiry suggested by the instrument, to identify the corn on the rented farm as intended to be covered. *Ib.*

6. SAME.—A description in a chattel mortgage calling for forty acres of corn, standing and grown on a certain subdivision of section 35, etc., is sufficient; though it is not stated that the land is in the county, yet the mortgagor is described as being of a certain county, and, as having the corn in his possession. *Ib.*

7. EFFECT OF POWER OF SALE ON PART OF MORTGAGOR.—To render a chattel mortgage constructively fraudulent, a power of sale or substitution on the part of the mortgagor must be reserved at the time of the execution of the mortgage; if conferred subsequently thereto, it will not have that effect. ***State ex rel. Smith v. Boever, 448.***



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8. CONSTRUCTIVE FRAUD—EFFECT OF ACTUAL DELIVERY OF CHATTELS TO MORTGAGEE.—A chattel mortgage which is only constructively fraudulent is purged of the fraud, if the mortgagee rightfully takes possession of the mortgaged property prior to any levy on it under process against the mortgagor. *Ib.*

9. RECORD—ATTACHMENT—PRIORITY.—An attachment levied prior to the recording of a previously given chattel mortgage, will not take precedence of such mortgage. Authorities and statute discussed. *Huiser v. Beck, 668.*

10. INTERPLEA BY MORTGAGEE IN ATTACHMENT PROCEEDING.—The seizing of mortgaged property under an attachment, and removing it, gives the mortgagee an option to take it into his possession, which he may exercise by interpleading in the attachment. *Ib.*

11. TROVER—RIGHT OF ACTION BY MORTGAGEE.—An action of trover cannot be maintained by one who has neither the right of property in the chattel alleged to have been converted, nor the right of possession; and neither of said rights follows from the mere fact that the plaintiff is a mortgagee of the chattel before condition broken. *Bank v. Fisher, 51.*

CIRCUIT COURTS. See COURTS.

COMMON CARRIER.

1. SLEEPING CAR COMPANIES, LIABILITY OF—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—A passenger on a sleeping car, who leaves his watch in his berth while he is in the toilet room, is, as a matter of law, guilty of contributory negligence if it is stolen in his absence, and therefore cannot recover from the company for the loss; but it is otherwise, if he directs the porter in charge of the car to look after his effects in his absence. *Chamberlain v. Pullman Palace Car Co., 474.*

2. SHIPMENT BEYOND CARRIER'S LINE—EVIDENCE OF AUTHORITY OF LOCAL AGENT.—The evidence in this cause is considered, and it is *held* sufficient to show authority upon the part of a local agent of a common carrier to make a contract for the through shipment of stock beyond the carrier's line. The evidence is also *held* insufficient to conclusively establish an abrogation of that contract by the delivery of the stock by the carrier to the shipper at the terminus of the carrier's line. *Handley v. Railroad, 499.*

CONTRACTS. See FRAUDS, STATUTE OF.

1. CONTRACTS, VALIDITY OF—EXTRA-TERRITORIAL EFFECT OF SUNDAY LAWS.—Our statutes against the performance of labor on Sunday have no extra-territorial effect, and, therefore, do not invalidate a contract which is made in this state, but is wholly to be performed beyond its limits. *Said v. Stromberg, 438.*

2. ———: CONTRACT FOR WORK ON SUNDAY.—A contract for work and the transaction of business on a Sunday is not invalid at common law. *Ib.*

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3. WAGERING CONTRACT—INSTRUCTIONS.—Instructions relating to a sale of hogs and presenting the issue of a wagering contract are set out and approved in the opinion. *Harding v. Manard, 364.*

4. GAMBLING CONTRACTS—SALES OF GRAIN ON MARGINS WITHOUT INTENT TO DELIVER.—Since the act of 1889 (Revised Statutes, 1889, sec. 3931, *et seq.*) contracts for the sale of grain are void, if one of the parties thereto does not intend to receive or deliver the commodity sold, and the other party is aware of this intent, whether he shares in it or not. That statute also affects middlemen. *Schreiner, Flack & Co. v. Orr, 406.*

5. ——— EVIDENCE OF INTENT NOT TO RECEIVE OR DELIVER.—The intent of a party to the contract, that there shall be no delivery of the commodity, may be gathered from all the attending circumstances. And *held*, that the evidence in this cause warranted the inference. *Ib.*

6. INDEPENDENT AGREEMENTS.—Two promises are not necessarily dependent because concurrent. *Terry v. Greer, 507.*

7. ———. When a contract requires a payment to be made at a time which may happen before a certain covenant of the payee is to be performed, such covenant and that for the payment are independent covenants. *Burris v. Shrewsbury Park, etc., Co., 381.*

8. DISCHARGE OF CONTRACT UNDER SEAL—CONSIDERATION.—A contract under seal may be discharged, before or after breach, by parol for valuable consideration; and a legal consideration for an agreement is furnished by the least advantage under it to the promisor or the least detriment to the promisee. *Lancaster v. Elliott, 249.*

9. CONSIDERATION.—A contractor for the erection of a building sublet a portion of his contract, which the subcontractor failed to execute in accordance with its provisions. Thereon it was agreed between the contractor and subcontractor that the work should be repaired at their joint expense so as to make it answer the requirements of the contract in respect to the deficiencies then known to the contractor. After the repairs had been partly proceeded with, the contractor ascertained that the work was deficient in other respects and refused to carry out this agreement. *Held*, that this agreement for repairs at joint expense was without consideration, and, notwithstanding its partial performance, was not obligatory on the contractor. *Storck v. Mesker, 26.*

10. RIGHT OF RESCISSION.—The breach of a contract will not warrant the rescission thereof by a party, if it was occasioned by his own default. *Burris v. Shrewsbury Park, etc., Co., 381.*

11. PRINCIPAL AND SURETY—ALTERATION OF INSTRUMENT—SEAL—DISCHARGE.—Changing a simple contract to a specialty by adding the word "seal" in a scrawl after the names of the obligors is such alteration of the instrument as to discharge the surety. The

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authorities are discussed and distinguished, and the holding reaffirmed on motion for a rehearing. *Fred Heim Brewing Co. v. Hazen, 277.*

12. FOR RULINGS in relation to building contracts, see Principal and Surety, 1 and 2.

13. MEASURE OF DAMAGES FOR BREACH.—When there is a breach of an agreement by a contractor to erect a building within a stipulated time, the value of the use of the building, while the owner is delayed in its occupancy by the fault of the contractor, is recoverable as damages. *Dengler v. Auer, 548.*

14. EVIDENCE OF DAMAGES FOR BREACH.—When a contractor sublets a part of his contract, and the subcontractor fails to perform his part of the work in conformity with the contract, the former cannot establish the quantum of his damages against the latter, nor his right to substantial damages, by proof that he had agreed upon their amount with another person with whom he relet the work, and thereon paid it. *Storck v. Mesker, 26.*

15. ORAL EVIDENCE IN AID OR VARIANCE OF ITS TERMS.—Evidence of a contemporaneous oral agreement between the parties to the contract, attaching a specific meaning to a technical term used in it, is not competent. *Ib.*

16. ——— EXTRINSIC EVIDENCE OF CUSTOM.—Extrinsic evidence is admissible in the construction of a building contract to show that a term in it, such as a requirement for "old style roofing tin," had by the usage of trade acquired a peculiar signification. *Ib.*

17. STATED ACCOUNT BETWEEN PARTIES.—When the parties to a building contract have agreed upon the amount due for a specific portion of the work, and the one who owes the amount thus agreed upon has paid it in accordance with the terms of the settlement, the other is debarred from making any further claim for the work. *Dengler v. Auer, 548.*

CONVERSION. See TROVER.

CONVEYANCES.

1. CONSIDERATION—PAROL EVIDENCE.—The consideration of a deed is ordinarily open and not concluded by that which is recited, and additional consideration may be shown, but it must not be inconsistent with the terms of the deed itself. *Hickman v. Hickman, 303.*

2. GENERAL WARRANTY—PAROL AGREEMENT FOR RESERVATION OF POSSESSION.—A contemporaneous oral agreement that the grantor in a general warranty deed is to remain in possession of the premises and enjoy the profits thereof, is inconsistent with the deed itself purporting to convey the title, and is in contradiction to the covenants therein. *Ib.*

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3. Implied covenant.—The sale of a thing imparts, from its very nature, the obligation on the part of a seller to secure to the purchaser the possession and enjoyment of the thing bought, the right to possess and enjoy being really that which is purchased. *Ib.*

4. Deed—consideration — parol agreement — resulting trust. On motion for rehearing, the authorities are further reviewed and the foregoing propositions again asserted, and it is further *held*, that the consideration of a deed cannot be so questioned by parol as to have the effect to create a resulting trust in the grantor. *Ib.*

CORPORATIONS. See Municipal Corporations.

1. Corporate action—agent's power in and out of convention. Certain individuals, convened and acting as a body corporate, may transact certain business and exercise certain powers given the corporations, yet, these same parties not so convened are powerless, even by unanimous consent, as individuals to perform the duties enjoined on the body. *State ex rel. Bank v. Wray, 646.*

2. Mandamus—expulsion of member by corporation.—A corporation whose members have property rights in it has no power to expel a member without due notice to him of the grounds of the proceeding, and a trial at which he has been afforded an opportunity to be present. When a member has been expelled in violation of this rule, he may compel the restoration of his privileges by *mandamus*. *Lysaght v. Stonemasons' Ass'n, 538.*

3. Same—When the laws of a mutual benefit society provide for the payment of benefits to defray the funeral expenses of members and of their wives, the members have property rights in the society within the purview of this rule. *Ib.*

4. Defense of ultra vires.—A corporation cannot plead *ultra vires* against an act by it merely in excess of its charter authority, where the consideration has been received by it and the transaction has been executed by the other party. *Ib.*

COSTS.

Costs of appeal.—As defendant was compelled to appeal to be relieved of the error in assessing a fee for plaintiff's attorney, the docket fee is taxed against the respondent. *Dilly v. Railroad, 125.*

COURTS.

1. Appointment of special judge of circuit court under act of 1891.—The act of 1891 (Session Acts, p. 113), providing for the appointment of a special judge of a circuit court when the regular judge is laboring under a temporary disability, applies to the circuit court of the city of St. Louis. *Bremen Bank v. Umrath, 43.*

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2. ——— DETERMINATION BY SPECIAL JUDGE OF MOTION FOR NEW TRIAL OF CAUSE TRIED BEFORE THE REGULAR JUDGE.—A special judge appointed under that act has the power to act on a motion for the new trial of a cause tried before the regular judge, and to sustain it for the reason that under the circumstances he cannot dispose of it upon its merits. A mere protest against his hearing of the motion will, therefore, not render his action in this regard erroneous; but whether it would have been so, had the objection been supported by affidavits showing a likelihood of an early return of the regular judge to the bench, is not decided. *Ib.*

3. JURISDICTION OF CIRCUIT COURTS—INTERFERENCE WITH PROCESS OF SUPREME COURT. *Held*, BOND, J., expressing no opinion, that a circuit court has no power to interfere with process of the supreme court, and that it has, therefore, no jurisdiction to restrain the levy of an execution issued by that court, where the execution creditor is insolvent, and the execution debtor holds an unpaid judgment against him for more than the amount of the execution. *Kinealy v. Staed, 176.*

COVENANTS. See CONTRACTS, 7; and CONVEYANCES, 2 to 4.

CRIMINAL LAW.

1. MALICIOUS DESTRUCTION OF FENCE—INFORMATION.—An information under section 3592, Revised Statutes, 1889, charged that the defendant did willfully and maliciously cut down, break and injure a portion of a certain fence, and contained words descriptive of the offense, in addition to those employed in the statute; but as they neither enlarge nor diminish the meaning of the statutory words, they may be rejected as surplusage. *State v. Morse, 332.*

2. ——— SUFFICIENCY OF COMPLAINT.—The same technical accuracy is not required in a complaint as in an information, and though the former does not use the statutory words, yet if it use words of equivalent import, it authorizes the filing of an information. *Ib.*

3. ——— AFFIDAVIT.—It is no objection to an information that it fails to charge that it is based upon an affidavit. *Ib.*

4. CRIMINAL PROCEEDINGS—FILING INFORMATION.—It is enough that the information is lodged with the justice, and the defendant arraigned and tried thereon, and it is then sent up to the circuit court on appeal, although the justice's minutes fail to state its filing and it is not marked filed. *State v. Plummer, 288.*

5. ——— JUSTICE OF WHAT COUNTY—EVIDENCE.—This record sufficiently shows that the justice before whom the proceeding began, and the one before whom it was tried, were both justices of the county where the offense occurred; and the evidence sustains the conviction. *Ib.*

6. ARRAIGNMENT.—Where there is no arraignment of the defendant, there must be a reversal of the judgment of conviction. *State v. Hubbell, 262.*

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7. CARRYING WEAPON—SELF-DEFENSE.—On the evidence in this case the sole issue to be tried is whether defendant was justified in carrying the pistol in his necessary self-defense, and the instructions should be confined to that issue. *Ib.*

8. INFORMATION—FILING OF COMPLAINT.—If an information discloses on its face that it is not made upon "the knowledge, information or belief" of the prosecuting attorney, but upon the complaint, either filed before a justice or delivered to the prosecuting attorney, it must in the one case be founded upon such complaint, and in the other accompanied by it, or otherwise the information should be quashed. (*Per* SMITH, P. J.) *State v. White, 356.*

9. ——— PROSECUTING ATTORNEY.—The prosecuting attorney holds not only the position of the attorney general or solicitor general of England, by virtue of which he may institute a criminal information at his will without the oath of himself or the affidavit of a third party, but also the position of the coroner as well, whereby he may file an information at the suggestion or instigation of a private citizen in the shape of an affidavit. Such affidavit should contain all matters necessary to criminate the defendant, and should be returned into court with the information, so that the defendant and the court may see its sufficiency and that the information follows it. *Ib.*

10. GAMING—INDICTMENT.—Whether an indictment for permitting the setting up of a gaming device would be sufficient by simply alleging that the house was occupied by the defendant, *quære*; and whether occupancy is tantamount to control, *quære;* but the indictment in this case negatives defendant's control by alleging possession and control in another. *State v. Mohr, 325.*

11. GAMING—INDICTMENT—IDEM SONANS.—"Mohr" and "Moores" are not *idem sonans*, and an indictment charging "Mohr" with permitting gaming in a room, of which "Moores" had possession and control, is bad. *Ib.*

12. IDEM SONANS—RULE.—Names are *idem sonans*, when the attentive ear finds difficulty in distinguishing them when pronounced in ordinary usage. *Ib.*

13. GAMING—INDICTMENT, OBJECTIONS TO.—It is not fatal to an indictment under section 3810, Revised Statutes, 1889, for permitting gaming device on premises, that it charges the device was "called" a pack of cards, instead of "was" a pack of cards. *Ib.*

14. ——— GAMING DEVICE.—A pack of cards is a gaming device; and an indictment is not bad for using the word "gambling" instead of "gaming."

15. COMMON GAMING HOUSE—ROOM OF HOUSE.—A common gaming house may be set up and kept in a single room of a house of many rooms, and the indictment need not allege the other rooms were unoccupied. *Ib.*

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DAMAGES. See BANKS, 2; SALES, 5.

1. CONTRACTS—EVIDENCE OF DAMAGES FOR BREACH.—When a contractor sublets a part of his contract, and the subcontractor fails to perform his part of the work in conformity with the contract, the former cannot establish the quantum of his damages against the latter, nor his right to substantial damages, by proof that he had agreed upon their amount with another person with whom he had relet the work, and thereon paid it. *Storck v. Mesker, 26.*

2. INSTRUCTIONS—MEASURE OF DAMAGES.—NONDIRECTION.—While it is the better practice to instruct the jury as to the measure of the damages, the failure of the court to do so amounts only to nondirection, and therefore is not ground for the reversal of the judgment. *Ib.*

3. BUILDING CONTRACT, BREACH OF—MEASURE OF DAMAGES.—When there is a breach of an agreement by the contractor to erect a building within a stipulated time, the value of the use of the building, while the owner is delayed in its occupancy by the fault of the contractor, is recoverable as damages. *Dengler v. Auer, 548.*

4. INJURY OF MINOR—EVIDENCE OF LOSS OF EARNING CAPACITY.—In an action by a father for damages for injuries to his minor child, whereby the child (a boy) was crippled, there was evidence tending to show that boys thus crippled could not find employment in a number of avocations, and that their earning capacity was, therefore, lost entirely, or nearly so. The defendant adduced no evidence of an earning capacity on the part of such a cripple in any avocation. *Held,* that there was sufficient proof of the plaintiff's damages in this regard. *Schmitz v. Railroad, 576.*

DEPOSITIONS.

1. NOT SIGNED BY WITNESS—WAIVER.—Where the signing of a deposition is waived at the close of the finding, this is sufficient to authorize its use at the trial. *Steckman v. Harber, 71.*

2. WAIVER OF PROCESS—DEPOSITION.—The mere presence of defendant at the time and place of plaintiff's taking of depositions, without any participation therein, will not amount to a waiver of service of process, though notice of their taking was given to defendant. *Anderson v. Anderson, 268.*

DIVORCE.

1. DESERTION.—If a husband sees fit to invite members of his family to live with him, his wife has no right to leave his home on that account. *Jones v. Jones, 523.*

2. ———. When a separation by a wife from her husband, though without justification, takes place with the tacit consent or connivance of the latter, it does not amount to desertion within the meaning of the law of divorce. *Droege v. Droege, 481.*

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3. ALIMONY—CONSTRUCTIVE SERVICE.—An action to disolve the marriage relation is a *quasi* suit *in rem*, the marriage *status* being the *res;* and on constructive service, and nonappearance of the defendant, the most that can be done is to abrogate the marriage relation to the relief of plaintiff; but there can be no personal judgment for alimony against the defendant. *Anderson v. Anderson, 268.*

4. ——— MODIFICATION OF JUDGMENT.—When there has on constructive service only been a decree of divorce entered without any judgment of alimony, whether at a subsequent term the court can modify such decree by making an allowance for alimony, *quære. Held*, however, that to such supplementary proceeding the defendant must be brought in by regular process, or enter his appearance.

5. INTEREST ON PAYMENTS FOR MAINTENANCE.—When a decree of divorce adjudges the payment of fixed installments of money from the husband to the wife for the maintenance of their child, each installment bears interest from the time when it is payable. *Lancaster v. Elliott, 249.*

ELEVATORS. See NEGLIGENCE, 1 to 5.

EQUITY. See QUIET TITLE, ACTION TO; also INJUNCTIONS.

1. CONDUCT OF PLAINTIFF —The maxim, "He who seeks equity, must do equity," applied to the facts of this case and the conduct of plaintiff in concealing a trustee's sale from the defendants to get even with one of them on account of another trade, results in the affirmance of a decree requiring the plaintiff to convey certain land to the defendants before he can have judgment against them on certain notes. *Steckman v. Harber, 71.*

2. ILLEGAL TRUSTS—ENFORCEMENT IN EQUITY.—A court of equity will not lend its aid to the enforcement of an illegal trust, and accordingly will not, at the suit of a debtor who has conveyed his property to hinder or defraud his creditors, compel a reconveyance to him. *Scudder v. Atwood, 512.*

3. ——— PLEADING.—Under the general issue evidence may be received, which tends to show a cause of action never existed, or that it was void *ab initio*. Accordingly, when a petition alleges a lawful trust in favor of the plaintiff and seeks to enforce it in equity, it may be shown under a general denial that the trust was made for fraudulent purposes. *Ib.*

4. ENFORCEMENT OF DORMANT JUDGMENT—STATUS IN EQUITY OF HOLDER OF SUCH JUDGMENT.—*Held*, by BOND, J., that a judgment which has lain dormant for more than ten years does not entitle its owner to any relief in equity beyond that of a general creditor of the judgment-defendant, and, accordingly, that it is not a proper basis for an injunction against the enforcement of another judgment obtained by such defendant against such owner. *Kinealy v. Staed, 176.*

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ESTOPPEL. See ASSIGNMENT, 1.

1. STATUTE OF FRAUDS.—The doctrine of estoppel cannot be invoked to validate a contract which the statute of frauds declares absolutely void. *Nichols v. Bank, 81.*

2. BREACH OF WARRANTY.—An action on the warranty of a machine will not be defeated by a paper signed after the sale, stating that the machine was working satisfactorily, and such paper does not estop the warrantee from the setting up of a breach of warranty, and testifying to matters inconsistent with such paper; nor will such paper be excluded in this case because it prevented plaintiff from claiming back from the machine company, nor because it was an injury to plaintiff to have the admission in the report disproved. *McManus v. Watkins, 92.*

EVIDENCE. See DEPOSITIONS; also WITNESSES.

1. JUDICIAL COGNIZANCE OF FACTS.—Courts will notice judicially on what day of the week a given date fell. *Said v. Stromberg, 438.*

2. DECLARATIONS OF AGENT—RES GESTÆ.—The declarations of an agent who issued an insurance policy and gave notice of the loss made *dum fervet opus* in the course of his employment, are admissible in evidence; and in this case, if improperly admitted, were merely cumulative and harmless. *Arnold v. Hartford Fire Ins. Co., 149.*

3. COMPETENCY OF DECLARATIONS OF ALLEGED COPARTNER.—The declarations of one member of an alleged partnership in reference to its business are admissible against another, when the existence of the partnership between them has been established *aliunde* by substantial evidence. *Rainwater v. Burr, 468.*

4. ORAL EVIDENCE IN AID OR VARIANCE OF WRITINGS.—A description in a chattel mortgage, calling for seventy acres of growing corn, raised by the mortgagor, on his farm in section 35, will not cover corn raised by him on an adjoining rented farm in the same section; nor is parol evidence admissible to show the mortgagor intended to include the corn on the rented place. *Mayer v. Keith, 157.*

5. ——— RECORDS.—Though the recital of a thing or matter of fact in a record, order or judgment will not control in the face of the thing itself, which being produced shows the contrary, yet, in the absence of such production, the record cannot be contradicted by a witness' memory of the contents of the absent paper. *Atwood v. Atwood, 370.*

6. ——— CONTRACTS.—Extrinsic evidence is admissible in the construction of a building contract to show that a term in it, such as a requirement for "old style roofing tin," had by the usage of trade acquired a peculiar signification. *Storck v. Mesker, 26.*

7. ———. But evidence of a contemporaneous oral agreement between the parties to the contract, attaching a specific meaning to a technical term used in it, is not competent. *Ib.*

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8. ——— DEEDS.—The consideration of a deed is ordinarily open and not concluded by that which is recited, and additional consideration may be shown, but it must not be inconsistent with the terms of the deed itself. *Hickman v. Hickman, 303.*

9. ——— POSSESSION.—A contemporaneous oral agreement, that the grantor in a general warranty deed is to remain in possession of the premises and enjoy the profits thereof, is inconsistent with the deed itself purporting to convey the title, and is in contradiction to the covenants therein. *Ib.*

10. ———. On motion for rehearing, the authorities are further reviewed and the foregoing propositions again asserted, and it is further *held*, that the consideration of a deed cannot be so questioned by parol as to have the effect to create a resulting trust in the grantor. *Ib.*

11. FOR RULING on the insufficiency of objections to evidence, see Practice Trial, 5.

EXECUTIONS. See BONDS; COURTS, 3.

1. CROPS.—Growing crops being *fructus industriales* are subject to seizure and sale under execution. *Selecman v. Kinnard, 635.*

2. ——— LIEN ON CROP—INJUNCTION.—A judgment creditor of a tenant, who pays his rent in part of the crop, cannot levy his execution on the immature crops growing on the rented premises, nor can he compel the landlord to take an estimated value of such crops so as to discharge his lien, and the landlord may enjoin the officer having such execution. *Ib.*

3. FOR RULINGS on the effect of levies, see Attachment, 9 and 10.

FIXTURES.

1. MIRROR NOT BUILT IN WALL.· A mirror not set in the wall but put up after the building was finished, so that its removal did not interfere with the wall, is a chattel and not part of the freehold, and does not pass therewith. *Loan v. Gregg, 581.*

2. INTENTION AND OTHER ELEMENTS—LAW AND FACT.—Intention to make a chattel a permanent accession to a building is not alone sufficient, without adaptability and annexation, and all of these are matters for the consideration of the jury in a proper case. *Ib.*

FORCIBLE ENTRY AND DETAINER.

1. SUFFICIENCY OF THE EVIDENCE.—The evidence in this case for forcible entry and detainer reviewed and found not to support a finding in favor of plaintiff, as it shows defendant was in peaceable possession under plaintiff's husband. *Kennedy v. Broyles, 257.*

2. POSSESSION—HUSBAND AND WIFE.—When the husband permitted the defendant to enter under the deed and himself quit the premises with his effects, having already taken his wife away, defendant

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was in the sole peaceable possession, and a subsequent entry for the plaintiff, the wife, was a trespass. *Ib.*

3. INSTRUCTIONS—RES ADJUDICATA. Instructions given and refused in reference to forcible entry and detainer, and a judgment set up in defense, are considered. *Myers v. Miller, 338.*

FRAUD AND FRAUDULENT CONVEYANCES. See BANKS, 4; CHATTEL MORTGAGES, 7, 8.

1. EVIDENCE OF FRAUD.—Fraud does not have to be shown by direct testimony, and may be inferred from circumstances, though it must be proved and never presumed; and where there is evidence thereof, as in this case, the finding of the lower court will not be disturbed. *Gordon v. Ismay, 323.*

2. SUFFICIENCY OF THE EVIDENCE.—The evidence in this case is sufficient to take the question of fraud in obtaining the judgment, on which appellant relied, to the jury, and support the finding. *Myers v. Miller,* 338.

3. VALIDITY OF PREFERENCE. Where a creditor of an insolvent firm, without knowledge of any fraud, and only endeavoring to secure payment of his own claim, takes no more goods than is necessary, he is not answerable as garnishee of the firm at the suit of another creditor. *Hellman & Co. v. Bick, garnishee, 168.*

4. INSUFFICIENCY OF THE EVIDENCE—INSTRUCTIONS.—The evidence in this case fails to show fraud, and the instructions, if erroneous, are so in being unnecessarily liberal to plaintiff. *Trorlicht Dunker & Renard Carpet Co. v. Hatton, 320.*

5. ———. The evidence in this case shows no fraud on the part of assignor or assignee, and there is no estoppel in the case, since none is pleaded. *Rock Island Plow Co. v. Lang & Gray, 349.*

FRAUDS, STATUTE OF.

1. PROMISE TO PAY FOR GOODS SOLD TO ANOTHER PERSON—INSTRUCTIONS.—To show that a promise to pay for goods sold and delivered to a third party was original and not within the statute of frauds, it is essential, if the purchase was not a joint one, that the credit for the goods should have been given solely to the promisor. And, *held,* that an instruction which submitted such an issue in this cause was not sufficiently definite and clear. *Gill v. Reed, 246.*

2. MEMORANDUM OF SALE OF LAND—SUPPLYING DEFICIENCY BY PAROL EVIDENCE.—The memorandum of a contract for the sale of land is insufficient under the statute of frauds, if the land cannot be identified from its terms, aided by its references to external standards of description. To have the effect of identification, the external standard thus referred to must have been known or existing at, or before, the making of the contract; a provision merely for

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future occupancy will not suffice. Nor can the failure of the memorandum to thus definitely locate the land be obviated by parol evidence. *Weil v. Willard, 376.*

3. ORIGINAL PROMISE—COLLATERAL PROMISE—ESTOPPEL.—The evidence in this case is reviewed and it is *held* that, if the representations of the cashier of the defendant bank in reference to the payment of a check drawn on the bank amounted to a promise at all, it was, in its nature, collateral and within the statute of frauds; also that the words and conduct of defendant's cashier could not operate as an estoppel *in pais*, as one cannot invoke the doctrine of estoppel to validate a promise which the statute declares absolutely void. *Nichols v. Bank, 81.*

FRAUDULENT CONVEYANCES. See FRAUD AND FRAUDULENT CONVEYANCES.

GARNISHMENT.

1. EFFECT OF ANSWER OF GARNISHEE.—The answer of a garnishee to the interrogatories filed by the attaching creditor is evidence in his favor of all affirmative facts stated therein by way of avoidance; accordingly it casts upon such creditor the burden of rebutting the allegations made in it. *Walker v. N. K. Fairbanks & Co., garnishee, 478.*

2. JURISDICTION.—A debt must have its *situs* within the terriorial limits of the jurisdiction of a court, in order to be subject to garnishment under the process of that court; and its *situs* for this purpose is the place where it is payable. *Ib.*

3. GARNISHMENT OF ASSESSMENTS BY BENEFIT SOCIETY.—An assessment made by a benefit society against a subordinate lodge reached the hands of the treasurer of the lodge, whose duty it then was to immediately forward the fund to the treasurer of the society; nor did the lodge thereafter, under its own laws or those of the society, have any control over the fund. *Held*, that the fund was subject to garnishment under a writ of attachment against the society, notwithstanding that the lodge had directed its treasurer not to forward, but to hold, the same, owing to the failing condition of the society. *Collins v. Kammann, garnishee, 464.*

HIGHWAYS. See NEGLIGENCE, 2.

HOMESTEAD.

WIFE'S CLAIM.—Until the wife's claim of homestead is made, acknowledged and filed for record, the husband's right to convey the title and possession is unaffected. *Kennedy v. Broyles, 257.*

HUSBAND AND WIFE. See MECHANICS' LIENS, 7.

INJUNCTION.

1. DISSOLUTION—ATTORNEYS' FEES AS DAMAGES.—Reasonable attorneys' fee for procuring the dissolution of an injunction are rightly

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considered in the assessment of damages on plaintiff's bond, yet, the amount to be allowed therefor is limited to fees paid the attorney for procuring the dissolution, and do not include fees paid for defending the entire case; and where the injunction is, as in this case, only incidental to the main contention and is dissolved by the judgment on the main controversy, counsel fees for the dissolution are not recoverable in an action on the bond. *Anderson v. Anderson, 268.*

2. PRELIMINARY RESTRAINING ORDER—EXACTION OF NON-STATUTORY BOND.—A temporary injunction was granted on condition that the plaintiff should give bond in statutory form, and furthermore execute a bond of idemnity to the party enjoined as trustee for persons who were not parties, but whose interests were affected, and both bonds were given. Subsequently the injunction was dissolved, and the plaintiff moved for the cancellation of the non-statutory bond. *Held,* that this motion was without merit. *Kinealy v. Stæd, 176.*

3. JURISDICTION OF CIRCUIT COURTS—INTERFERENCE WITH PROCESS OF SUPREME COURT. *Held,* BOND, J., expressing no opinion, that a circuit court has no power to interfere with process of the supreme court, and that it has, therefore, no jurisdiction to restrain the levy of an execution issued by that court, where the execution creditor is insolvent, and the execution debtor holds an unpaid judgment against him for more than the amount of the execution. *Ib.*

4. ENFORCEMENT OF DORMANT JUDGMENT—STATUS IN EQUITY OF HOLDER OF SUCH JUDGMENT.—*Held,* by BOND, J., that a judgment which has lain dormant for more than ten years does not entitle its owner to any relief in equity beyond that of a general creditor of the judgment-defendant, and, accordingly, that it is not a proper basis for an injunction against the enforcement of another judgment obtained by such defendant against such owner. *Ib.*

INSTRUCTIONS.

1. ABSTRACTIONS—COVERING CASE.—Instructions which are mere abstractions, and do not cover the whole case, are properly refused. *Arnold v. Hartford Fire Ins. Co., 149.*

2. COMMENTING ON CHARACTER OF THE CAUSE.—It is objectionable for the court in an instruction to the jury to state that it considers the cause a very simple one both as to the law and the facts, and to urge the jury to come to some agreement, owing the small amount of money involved. *Skinner v. Stifel, 9.*

3. INSTRUCTION GIVEN ORALLY AND IN ABSENCE OF COUNSEL.—It is error for the trial court, after the submission of a cause to the jury, to give to them additional instruction orally or in the absence of counsel whose attendance can be procured. *Ib.*

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4. Banks and banking—instructions—not supported by evidence. It is error to instruct a jury as to the effect of negligence of a banker in accepting a note with a forged signature, when there is no evidence showing such negligence. *First National Bank v. Lillard, 675.*

5. Measure of damages—non-direction.—While it is the better practice to instruct the jury as to the measure of damages, the failure of the court to do so amounts only to non-direction, and therefore is not ground for the reversal of the judgment. *Stork v. Mesker, 26.*

6. Burden of proof—The burden of proof is not affected by evidence of facts which establish a *prima facie* case. It remains the same throughout the case; and, notwithstanding such *prima facie* case, the jury may accordingly be instructed that it is on the party who has it at the outset. *J. D. Marshal Livery Co., v. McKelvy, 240.*

7. Wagering contract.—Instructions relating to a sale of hogs and presenting the issue of a wagering contract are set out and approved. *Harding v. Manard, 364.*

8. Contributory negligence.—When, in an action for damages for a physical injury, there is substantial evidence of contributory negligence on the part of the person injured, it is error to instruct the jury that there is a legal presumption that he exercised ordinary care. *Lee v. Publishers, Geo. Knapp & Co., 390.*

9. Negligence.—An instruction authorizing a recovery by a servant against his master for injury from a defect in the appliances furnished by the latter, is fatally erroneous, if it does not require a finding that the defect was the cause of the injury. *Moore v. St. Louis Wire Mill Co., 491.*

10. Manner of making and preserving objections to instructions. Exceptions to instructions given by the court need not be taken specifically; a general exception addressed to the instructions in the aggregate will suffice. *Whipple v. Building and Loan Ass'n, 554.*

11. Witnesses.—Instructions calling attention to the veracity of witnesses are not favored by the courts, and the propriety and necessity is left largely with the discretion of the trial courts, and, when given, they should be drawn so as to confine their application to material facts. *White v. Lowenberg, 69.*

12. ———. An instruction telling the jury if they believe any witness has willfully sworn falsely they are at liberty to disregard the whole of his testimony, is fatally faulty in not confining the false swearing to a material fact. *Ib.*

13. For instruction on waiver of proofs of loss under fire insurance policy, see *Arnold v. Hartford Fire Ins. Co.*, 149.

14. For ruling on the office and effect of instructions in cases tried by the court sitting as a jury, see Practice, Appellate, 18 to 20.

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INSURANCE (FIRE).

1. CONSTRUCTION OF TERMS OF POLICY.—In the solution of language of doubtful import, as it may appear in the policies of insurance, the courts will resolve the doubts in favor of the assured, for the reason that such clauses are interjected into the policy for its protection and serve to qualify and restrict its main obligation; and in this case it is assumed that the language was intended to have such meaning as people ordinarily affix to it. *Ethington v. Dwelling House Ins. Co., 129.*

2. STIPULATION AGAINST CHANGE OF TITLE—UNPAID MORTGAGE DEBT.—A mortgage existed at the time the insurance was effected. After the debt became due, and before it was paid, a loss occurred. *Held,* such default in payment did not avoid the policy under the stipulation therein, providing that any change in the interest, title or possession, etc., rendered it void. *Ib.*

3. PROOFS OF LOSS — WAIVER — EVIDENCE—INSTRUCTIONS.—Though proofs of loss are not as full and complete as required by the conditions of the policy, yet if they are timely received and objections are withheld until after time of making proofs and after negotiations for compromise, such objections are waived, and the proofs are admissible in evidence. An instruction on the point set out in the opinion is approved. *Arnold v. Hartford Fire Ins. Co., 149.*

4. EVIDENCE—DECLARATIONS OF AGENT—RES GESTÆ—HARMLESS ERROR. The declarations of an agent who issued the policy and gave notice of the loss, made *dum fervet opus* in the course of his employment, are admissible in evidence; and in this case, if improperly admitted, were merely cumulative and harmless. *Ib.*

5. WAIVER OF PROOFS OF LOSS—LAW AND FACT.—Waiver of proofs of loss is a jury question, and the appellate court is concluded by the finding, if there is any evidence to sustain it. *Ib.*

INSURANCE (LIFE).

1. WAIVER OF FORFEITURE.—Waiver differs from estoppel in that it depends solely on the intention of the party against whom it is invoked. *Stiepel v. German Am. Mut. Life Ass'n, 224.*

2. ——— SUFFICIENCY OF EVIDENCE.—When the failure of the insured does not absolutely avoid his life insurance, but entitles him to a reinstatement of it within one year upon payment of the delinquent dues, a showing of good cause and satisfactory proof of good health, proof that the insurer, after default but within the year, mailed circulars to him advising him of assessments, is not sufficient evidence of a waiver of the forfeiture. *Ib.*

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INTEREST.

USURY — WHO MAY TAKE ADVANTAGE OF STATUTE — ATTACHMENT CREDITOR.—The defense of usury is a personal privilege of the debtor, his privies in representation, in blood, or in estate, as his vendee, execution creditor, or, as in this case, his attachment creditor who may defend against his debtor's mortgage on the ground that it secures usury, as provided in section 2, page 171, Laws, 1891. *American Rubber Co. v. Wilson, 656.*

INTERPLEADER. See ATTACHMENT, 3 to 7.

JUDGES, SPECIAL. See COURTS, 1 and 2.

JUDGMENTS. See JURISDICTION, 1 and 2.

1. ATTACHMENTS—EFFECT OF RECOVERY OF JUDGMENT ON LIEN OF ATTACHMENT.—When the plaintiff in a suit by attachment recovers judgment, the lien of the judgment merges that of a levy of the writ of attachment on land, subject to the doctrine of relation in the determination of priorities. Accordingly the lien of such levy is lost, if the lien of the judgment is allowed to expire by limitation. *Green v. Dougherty, 217.*

2. LIEN ON LAND.—The duration of the lien on a judgment on land of the judgment debtor will not be extended through the recall and stay of execution on motion of such debtor and the giving of bond under section 2406 of the Revised Statutes of 1879 by him. *Ib.*

3. COLLATERAL ATTACK—STRANGERS—INFERIOR COURT. When a court has jurisdiction of the parties and the subject-matter, the judgment is binding and effectual upon all the parties and their privies and cannot be questioned in a collateral proceeding, and this rule obtains as well in cases in justices' courts and other statutory courts as in courts of record; but such rule does not extend to strangers, who may set up the defense of fraud in obtaining it whenever it is attempted by it to affect their rights. *Myers v. Miller, 338.*

4. FORCIBLE ENTRY AND DETAINER—RES ADJUDICATA.—Instructions given and refused in reference to forcible entry and detainer, and a judgment set up in defense, are considered. *Ib.*

5. EVIDENCE OF FRAUD.—The evidence in this case is sufficient to take the question of fraud in obtaining the judgment, on which appellant relied, to the jury, and support the finding. *Ib.*

JURISDICTION. See ADMINISTRATION, 2; APPEALS, 1 to 4; GARNISHMENT, 2; JUSTICES' COURTS, 3, 5, 6 and 8.

1. ORDER OF PUBLICATION—AFFIDAVIT—PRESUMPTION.—When a court of general jurisdiction has jurisdiction over the subject-matter, it will be presumed that, in acquiring jurisdiction over the person, it has acted correctly; and an order of publication reciting that "it



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appearing to the satisfaction of the clerk that defendant was a non-resident," a sufficient affidavit will be presumed. *Atwood v. Atwood,* 370.

2. RECORD, CONTRADICTION OF—PAROL EVIDENCE.—Though the recital of a thing or matter of fact in a record, order or judgment will not control in the face of the thing itself, which being produced shows the contrary, yet in the absence of such production, the record cannot be contradicted by a witness' memory of the contents of the absent paper. *Ib.*

3. JURISDICTION OF CIRCUIT COURTS—INTERFERENCE WITH PROCESS OF SUPREME COURT. *Held,* BOND, J., expressing no opinion, that a circuit court has no power to interfere with process of the supreme court, and that it has, therefore, no jurisdiction to restrain the levy of an execution issued by that court, where the execution creditor is insolvent, and the execution debtor holds an unpaid judgment against him for more than the amount of the execution. *Kinealy v. Staed, 176.*

JUSTICES' COURTS.

1. AFFIDAVIT FOR APPEAL— JURISDICTION.—Although the affidavit for appeal from a justice's court fails to state whether the appeal is from the merits or an order taxing costs, yet on the granting of the appeal by the justice and the filing of the papers in the clerk's office, the circuit court becomes possessed of the cause, and if the appellee proceeds without objection, the defect is waived. Limiting *Whitehead v. Cole,* 49 Mo. 428. *Welsh v. Railroad, 599.*

2. SAME.—Although an affidavit for an appeal from a justice's court fails to state whether the appeal was from the merits or matter of costs, it still confers jurisdiction on the circuit court and may be amended before the motion to dismiss is passed upon. *Watson v. Barbee, 147.*

3. SAME.—The circuit court has concurrent jurisdiction with a justice of the peace in an action to recover damages for injuries to plaintiff's crops; and where the justice grants an appeal and files the paper in the circuit clerk's office, and the parties apear and go to trial on the merits without objection to the appeal affidavit or the jurisdiction, it must be construed as an admission of the jurisdiction of the court and a waiver of all defects in taking the appeal. *Pearson v. Gillett, 312.*

4. DEFECTIVE AFFIDAVIT—APPEARANCE.—A defect in an affidavit for an appeal from a justice's court is waived by the general appearance of the appellee; and a proceeding to trial after making objection to the affidavit waives the objection. *Nicholson v. Railroad, 593.*

5. WAIVER OF OBJECTION TO WANT OF JURISDICTION.—The doctrine that jurisdiction over persons may be conferred by consent or waiver, is applicable to justices' courts. *Grimm v. Dundee Land and Investment Co., 457.*

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6. JURISDICTION—ATTACHMENT—INTERPLEA.—Where a justice acquires jurisdiction of an attachment proceeding, he also has jurisdiction to hear and determine an interplea for the attached property, although such property exceeds in value the amount fixed by statute as the limit of justices' jurisdiction, such interplea being an incident growing out of the principal action. *Springfield, etc., Co. v. Glazier, 95.*

7. FILING OF PAPERS.—The filing of a paper—in this cause the contract sued upon—is its actual delivery to the officer whose duty it is to file it. The filing need not be shown by a file mark. *Collins v. Kammann, garnishee, 464.*

8. JURISDICTIONAL FACTS.—It is not essential to the validity of the judgment of a justice of the peace that the jurisdictional facts should appear from his docket entries; it suffices if they appear anywhere on the face of the proceedings. *Ib.*

9. SETTING ASIDE DEFAULT—COMPUTATION OF TIME.—If the ten days, allowed by statute for the filing of a motion to set aside a judgment by default in a justice court, should expire on a Sunday, the motion must be filed before that day. *State ex rel. Kerr v. Sheehan, 66.*

LANDLORD AND TENANT.

1. LEASE—CONSTRUCTION—SALE BY LANDLORD.—A lease stipulated that, in case of sale, the lessee was to have a fair valuation for any and all improvements made by him. The lessor sold, during the term, subject to all the lessee's rights under the lease. The lessee attorned to the purchaser and occupied the premises till the expiration of the lease, when he abandoned the premises and improvement, and brought this action against his lessor for the value of the improvements. *Held*, he could not maintain the action, as the above stipulation was only intended to apply to a sale where the lessee's rights would not be protected. *Chandler v. Oldham, 139.*

2. DISPUTING LANDLORD'S TITLE—ESTOPPEL.—A tenant may not dispute his landlord's title at the commencement of the term, but may show that his interest has terminated by the efflux of time; and the fact that, by inadvertence or mistake of his rights, he may have paid rent for the expiration of leasehold, will not be construed into a continuance of the tenancy. *Robinson v. Troup Mining Co., 662.*

3. LEASE—LIEN ON GOODS FOR RENT.—An unacknowledged and unrecorded lease, providing for a lien on the goods in the building as a security for the rent, will create no lien on such goods against third parties who have knowledge of it. *Wm. W. Kendall, etc., Co. v. Bain, 264.*

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4. LIEN ON CROP—EXECUTION V. TENANT.—A judgment creditor of a tenant who pays his rent in part of the crop, cannot levy his execution on the immature crops growing on the rented premises, nor can he compel the landlord to take an estimated value of such crops so as to discharge his lien, and the landlord may enjoin the officer having such execution. *Selecman v. Kinnard, 635.*

5. CONVEYANCE OF REVERSION—RENTS.—The sale of the reversion carries with it, unless expressly reserved, all rents that may subsequently become due under a lease previously given, and the grantee may recover the same in his own name. *Page v. Culver, 606.*

6. ——— APPORTIONMENT OF RENTS.—At common law, as rent followed the reversion, no apportionment would be made; but monthly, quarterly and annual rent would follow the land and belong to the owner at the time it accrued. *Ib.*

7. ——— INTEREST IN CROPS.—An administrator's sale of land effectually carries the reversion with rent to accrue as an incident thereto, though it be part of the crop, and this, without reference to the condition of the crop as to maturity or immaturity at the time of the sale. *Ib.*

8. SUFFICIENCY OF SERVICE OF NOTICE TO QUIT.—When the statute requires notice in writing, as in the case of notice for the termination of a tenancy from month to month, the reading of a written notice to the person to be served does not satisfy the requirement. *Langan v. Schlief, 213.*

9. SAME.—A landlord's notice to quit was addressed to two persons. It was served on one of them by the reading of it to him, and a copy of it was furthermore delivered to him for the other. *Held*, that evidence of these facts warranted a finding of adequate service on the person to whom the copy was thus delivered. *Ib.*

10. MINES AND MINING—POSTING NOTICE OF LEASE—SUBTENANT'S PURCHASE OF LANDLORD'S TITLE.—Where the landlord on leasing mining lots fails to post the notices required by section 7034, Revised Statutes, 1889, the lease will expire at the close of three years, and the subtenant, who, during the currency of the three years, bought the landlord's title, will take the same at the expiration of that time, free from the prior claim of the first tenant. *Robinson v. Troup Mining Co., 662.*

LAW AND FACT. See FIXTURES, 2.

1. INTERPRETATION OF WRITINGS—RESCISSION OF CONTRACT OF SALE. The interpretation of writings is always for the court, except when they are ambiguous and the ambiguity must be solved by extrinsic unconceded facts, or when they are adduced merely as containing evidence of facts from which different inferences can be drawn and when it is for the jury and not for the court to draw these inferences. And *held* that correspondence in evidence in this

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cause, which was offered to establish the rescission of a contract of sale, did not fall within either of these exceptions. *Enterprise Soap Works v. Sayers, 15.*

2. BANKS—NEGLIGENCE IN FAILING TO COLLECT DRAFT—LAW AND FACT.—Whether conduct amounts to negligence is a question of law, when the facts are not in dispute and but one inference can reasonably be drawn therefrom. This rule is applied to the failure of a bank to either collect a draft received by it for collection, or to notify the drawer of its nonpayment in due time. *Selz v. Collins, 55.*

3. SAME.—But whether the drawer, in the case of such negligence on the part of a bank is entitled to a verdict for the full amount of the draft is *held* under the evidence in this cause to be a question of fact, dependent upon the probability of the collection of the draft, if the bank had used due diligence in pressing the drawee for payment, or in notifying the drawer of the nonpayment of the draft. *Ib.*

4. RISKS ASSUMED BY SERVANT—APPARENT DEFECTS IN APPLIANCES. Whether a defect in an appliance furnished by a master to his servant is obvious, so as to impose upon the latter the risk of injury, is a question of fact when different conclusions in regard thereto can reasonably be drawn from the evidence. *Moore v. St. Louis Wire Mill Co., 491.*

5. RAILROADS—FENCING STATION GROUND.—Whether a railroad company has placed its fence and cattle guards as near the head of its switch as is consistent with the safety of trainmen in switching trains at the station is a question for the jury under proper instructions. *Welch v. Hannibal & St. Joseph R'y Co., 599.*

6. SALES—WARRANTY—RESCISSION—REASONABLE TIME.—The vendee of a chattel mortgage on breach of warranty may rescind the contract and recover back the purchase price, yet he must act within a reasonable time, which is ordinarily a question for the jury; but where, as in this case, the delay is without excuse or fair explanation, the courts will as a matter of law declare the same unreasonable. *Viertel v. Smith, 617.*

LAWS. See MUNICIPAL CORPORATIONS, 1 and 2.

JUSTICES' COURTS—SETTING ASIDE DEFAULT—COMPUTATION OF TIME. If the ten days, allowed by statute for the filing of a motion to set aside a judgment by default in a justice court, should expire on a Sunday, the motion must be filed before that day. *State ex rel. Kerr v. Sheehan, 66.*

LIENS. See JUDGMENTS, 2; also LANDLORD AND TENANT, 3 and 4.

MALICIOUS ATTACHMENT. See ATTACHMENT, 11 and 12.

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MANDAMUS.

1. Expulsion of member by corporation.—A corporation whose members have property rights in it has no power to expel a member without due notice to him of the grounds of the proceeding, and a trial at which he has been afforded an opportunity to be present. When a member has been expelled in violation of this rule, he may compel the restoration of his privileges by *mandamus*. *Lysaght v. St. Louis, etc., Ass'n, 538.*

2. ———. When the laws of a mutual benefit society provide for the payments of benefits to defray the funeral expenses of members and of their wives, the members have property rights in the society within the purview of this rule. *Ib.*

MASTER AND SERVANT. See Negligence, 6 to 10.

Proof of incompetency of servant.—A servant, employed in a stated capacity for a fixed term on condition that he was competent therefor, was dismissed by the master after he had been engaged for a month in the discharge of his duties but during the term of the employment. The master sought to justify the dismissal by proof of the servant's incompetency. *Held*, that evidence of the servant's general reputation as a workman, and of his failure to give satisfaction in other like employment, was not admissible for this purpose. *Rich v. Fendler, 236.*

MECHANICS' LIENS.

1. Sufficiency of account filed as lien.—A lumping charge in an account filed as a mechanic's lien, though not accompanied by any detailed statement of the work for which it is made, is sufficient, when it is a fact, and the account on its face shows, that there was a special contract for the work at the amount of the charge, and when, moreover, the action for the enforcement of the lien is based upon the contract, and not upon a *quantum meruit*. Especially is this true, when the lien is filed by an original contractor as distinguished from a subcontractor. *Busso v. Fette, 453.*

2. ———. It is not necessary that the lien paper should, in terms, allege that the person to whom the material was furnished was the original contractor; it is sufficient if it states the names of the contracting parties, with whom the plaintiffs agreed to do the work and furnish the material without stating that the contractor made a contract with the owner; and the lien paper in this case is *held* sufficient, since it gave the owner all the information necessary to protect himself. *Cahill, Collins & Co. v. Ely, 102.*

3. ——— lienable and non-lienable items.—A lien paper is not inadmissible because some of the items are non-lienable, when they are separately stated and not mingled with lienable items. *Price v. Merritt, 640.*

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4. ——— COMMISSION—DRAYAGE.—Items for drayage, freight and commission are proper charges in a lien account, where the contract for furnishing the material was that the material-man should have ten per cent. above cost and carriage to him. *Ib.*

5. ——— WORK ON PROPERTY NOT DESCRIBED IN LIEN ACCOUNT.—*Held,* in the course of discussion, that a mechanic's lien cannot be established for work, or against property, broader than the statements of the lien account, and, therefore, that work done on an outhouse cannot be considered in determining the date of the accrual of the lien account, when the lien is filed against the main building only. *Krah v. Weidlich, 536.*

6. APPLICATION OF PAYMENTS.—Payments were made without direction as to their application, and were not at the time applied by the creditors. *Held,* the court properly applied them to the non-lienable and unsecured portion of the account. *Price v. Merritt, 640.*

7. AGENCY OF HUSBAND FOR WIFE.—The evidence in this cause is considered, and it is *held* to justify the submission to the jury of the issue whether a contract in writing, entered into by a husband in his own name for the erection of a building on land of his wife, had been made by him as agent for the wife, so as to render the land chargeable with a mechanic's lien for materials furnished for the building. *Carthage, etc., Co. v. Bauman, 204.*

8. TITLE IN MORTGAGEE.—Where the title to the real estate is in a mortgagee, who directs and assents to an improvement, such real estate will be subject to the lien for such improvement. *Price v. Merritt, 640.*

9. ENTIRETY OF JUDGMENT—EFFECT OF APPEAL.—The judgment in an action by a subcontractor to enforce a mechanics' lien is an entirety. Accordingly, when in the trial court it is against both the original contractor personally and the claim of lien, the reversal of it by this court on appeal by the plaintiff vacates it altogether, and necessitates a retrial of the cause in both respects. *Carthage, etc., Co. v. Bauman, 204.*

10. SAME.—The plaintiff herein, who was a surety on the bond of a contractor for a building, sued to enforce a mechanic's lien for work done on the building, and recovered judgment. The defendant owner recovered judgment on a counterclaim based on the bond. *Held,* on appeal by the plaintiff, that error in the trial of the counterclaim should work a reversal of both judgments. *Killoren v. Meehan, 427.*

MINING.

POSTING NOTICE OF LEASE—SUBTENANT'S PURCHASE OF LANDLORD'S TITLE.—Where the landlord on leasing mining lots fails to post the notices required by section 7034, Revised Statutes, 1889, the lease will expire at the close of three years, and the subtenant, who,

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during the currency of the three years bought the landlord's title, will take the same at the expiration of that time, free from the prior claim of the first tenant. *Robinson v. Troup Mining Co., 662.*

MORTGAGES. See CHATTEL MORTGAGES.

1. EFFECT OF DEFAULT IN PAYMENT—SECURITY.—Though, on failure to pay a mortgage debt according to the terms, the legal title passes to the mortgagee, yet the substantial interest remains where it was before, and the mortgage is still a mere security for the debt. *Ethington v. Dwelling House Ins. Co., 129.*

2. MECHANICS' LIENS—TITLE IN MORTGAGEE.—Where the title to the real estate is in a mortgagee, who directs and assents to an improvement, such real estate will be subject to the lien for such improvement. *Price v. Merritt, 640.*

3. FOR EFFECT of usury on a mortgage taken to secure the usurious debt, see Interest.

MUNICIPAL CORPORATIONS.

1. ORDINANCE REFERRING TO ANOTHER ORDINANCE.—A special ordinance, directing the construction of a sidewalk, ordered it to be constructed in the manner and of the material named in a certain section of a general ordinance relating to sidewalks. *Held*, such section of the general ordinance was thereby made a part of the special ordinance. *Gallaher v. Smith, 116.*

2. DELEGATION OF LEGISLATIVE AUTHORITY—PINE OR OAK SIDEWALK. An ordinance provided that a sidewalk might, at the option of the contractor, be constructed of pine, white or burr oak of certain dimensions. *Held*, the ordinance was not void, and did not constitute a delegation of legislative authority, distinguishing *Galbreath v. Newton*, 30 Mo. App. 380, and *Ruggles v. Collier*, 43 Mo. 353. *Ib.*

3. PUBLIC CORPORATIONS—AGENT'S POWER IN AND OUT OF CONVENTION.—Certain individuals, convened and acting as a body corporate, may transact certain business and exercise certain powers given the corporation, yet these same parties not so convened are powerless, even by unanimous consent, as individuals to perform the duties enjoined on the body. *State ex rel. v. Wray, 646.*

NEGLIGENCE.

1. LAW AND FACT.—When the evidence in an action at law is conflicting, or warrants the deduction of different rational inferences, it is the province solely of the jury to reconcile it, or to determine which of these inferences is to be drawn from it. This rule is applied in this cause to issues in regard to the existence of negligence. *Lee v. Publishers, Geo. Knapp & Co., 390.*

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2. CONTRIBUTORY NEGLIGENCE—LAW AND FACT.—The evidence in this cause is considered, and *held* not to exclusively establish contributory negligence on the part of the plaintiff in failing to observe an excavation in a public highway. *Skinner v. Stifel, 9.*

3. DAMAGES—EVIDENCE OF LOSS OF EARNING CAPACITY.—In an action by a father for damages for injuries to his minor child, whereby the child (a boy) was crippled, there was evidence tending to show that boys thus crippled could not find employment in a number of avocations, and that their earning capacity was, therefore, lost entirely, or nearly so. The defendant adduced no evidence of an earning capacity on the part of such a cripple in any avocation. *Held*, that there was sufficient proof of the plaintiff's damages in this regard. *Schmitz v. Railroad, 567.*

4. INSTRUCTION AS TO PRESUMPTION OF CARE.—When, in an action for damages for a physical injury, there is substantial evidence of contributory negligence upon the part of the plaintiff, it is error to instruct a jury that there is a legal presumption that he exercised ordinary care. *Lee v. Publishers, Geo. Knapp & Co., 390.*

5. ELEVATORS—STANDARD OF CARE REQUIRED OF OWNER.—*Held*, in the course of discussion, that, in determining whether the owner of an elevator has exercised due diligence in making it reasonably safe for its intended uses, the usage of others is not the sole criterion, and that such diligence does not, as a matter of law, follow from the fact that the elevator is such as is ordinarily used for like purposes by reasonably prudent men. *Ib.*

6. MASTER AND SERVANT—INSTRUCTIONS.—An instruction authorizing a recovery by a servant against his master for injury from a defect in the appliances furnished by the latter, is fatally erroneous, if it does not require a finding that the defect was the cause of the injury. *Moore v. St. Louis Wire Mill Co., 491.*

7. ——— NEGLIGENCE OF FELLOW SERVANT.—While a building was in process of erection, lumber was hoisted to one of the upper floors by means of an apparatus operated by steam power. *Held*, that one of the workmen who received the lumber thus hoisted, and the engineer in charge of the engine by which the steam power was generated, were *prima facie* fellow servants within the rule making the negligence of a fellow servant a risk incident to the employment. *Sheehan v. Prosser, 569.*

8. ——— PLEADING.—The defense, that personal injuries sued for were caused by the negligence of a fellow servant of the plaintiff, is available in an action by a servant against his master without being specially pleaded. *Ib.*

9. ——— ACCEPTANCE OF RISKS BY SERVANT.—A servant assumes all risks arising from defective appliances of which he knew, or which were so obvious as not to escape the observation of an ordinarily prudent person. *Moore v. St. Louis Wire Mill Co., 491.*

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10. ——— ——— LAW AND FACT.—Whether the risk is thus obvious is a question of fact, when different conclusions in regard thereto can reasonably be drawn from the evidence. *Ib.*

11. RAILROADS—SIGNALS AT CROSSING.—A railroad company, when it fails to ring the bell or sound the whistle as the train approaches a highway crossing, violates the statute and is guilty of negligence. *McNown v. Wabash Railroad Co., 585.*

12. ——— ——— CONTRIBUTORY NEGLIGENCE.—In order to justify the court in taking a case from the jury and declare plaintiff negligent, as a matter of law, it should clearly and incontrovertibly appear that no other conclusion than that of plaintiff's negligence is fairly deducible from the evidence, giving him the benefit of every reasonable inference that may be drawn from it; and the evidence in that case does not justify the court in declaring plaintiff guilty of contributory negligence, ELLISON, J., *dissenting.* *Ib.*

13. SAME.—A person on the highway approaching a railroad crossing is only required to use ordinary care, which does not mean that every possible precaution shall be adopted, but only that care and circumspection which should be expected of one of ordinary prudence. *Ib.*

14. SLEEPING CAR COMPANIES, LIABILITY OF—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—A passenger on a sleeping car, who leaves his watch in his berth while he is in the toilet room, is, as a matter of law, guilty of contributory negligence if it is stolen in his absence, and therefore cannot recover from the company for the loss; but it is otherwise if he directs the porter in charge of the car to look after his effects in his absence. *Chamberlain v. Pullman Palace Car Co., 474.*

15. NEGLIGENCE IN OVERDRIVING—EXPERT EVIDENCE.—The plaintiff sued herein for the death of a horse, alleged to have been caused by overdriving. He sought to establish this allegation by the opinion of an expert, and with that purpose put to the expert a hypothetical case, which substantially covered the facts shown in evidence, with the exception of the speed at which the horse was driven. *Held,* that this omission rendered the hypothetical case objectionable. *J. D. Marshall Livery Co. v. McKelvy, 240.*

16. FOR RULINGS in regard to the liability of bankers for negligence in the collection of a draft, see Banks, 1 to 3.

17. FOR RULINGS in regard to the killing of stock by railroads, see Railroads, 1 to 7.

NEGOTIABLE PAPER. See BANKS, 5.

1. PROMISSORY NOTES—DISCHARGE OF PARTY BY MATERIAL ALTERATION. The material alteration of a promissory note discharges a party to it, if it is made without his consent. *Barnett v. Nolte, 184.*

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2. Justices' courts—suit on promissory note—election of theory of action.—When suit on a promissory note is brought before a justice of the peace against one whose name is written on the back of the note above that of the payee, the plaintiff may be required to elect in the circuit court on appeal, if he has not done so theretofore, in what capacity he seeks to charge the defendant—whether as joint maker, indorser, surety or guarantor—and is bound by his election, when made. *Ib.*

NEW TRIAL. See Practice, Trial, 13 to 15.

NOTICE. See Landlord and Tenant, 8 to 10.

PARTNERSHIP.

1. Assignment by partner on behalf of firm.—Though one partner is not authorized, by virtue of the partnership relation alone, to make a voluntary assignment for the firm, yet he may do so with the express assent and direction of the other members; and the other partners alone have the right to complain of such assignment, and not firm creditors. *Rock Island Plow Co. v. Lang & Gray, 349.*

2. Sale of partner's interest—action at law.—A partner may sell to his copartners his interest in the partnership and recover the purchase price in an action at law, and this, too, whether such interest is incumbered or unincumbered by the condition of the partnership, or whether its amount is fixed or the price thereof agreed upon. *Baker v. Robinson, 171.*

3. Competency of declarations of alleged copartner.—The declarations of one member of an alleged partnership in reference to its business are admissible against another, when the existence of the partnership between them has been established *aliunde* by substantial evidence. *Rainwater v. Burr, 468.*

PAYMENT.

Application of payments.—Payments were made without direction as to their application and were not at the time applied by the creditors. *Held,* the court properly applied them to the non-lienable and unsecured portion of a mechanic's lien account. *Price v. Merritt, 640.*

PLEADING.

1. Default.—The answer of one defendant to a petition against several applies to a subsequent amended petition, which does not change the effect of the original petition as to him; hence his failure under these circumstances to plead to the amended petition does not put him in default. *Bremen Bank v. Umrath, 43.*

2. Answer—consistent defenses.—*Non est factum* and nonperformance of the contract are not so inconsistent that they cannot stand together, the proof of one not necessarily disproving the other. *Cox v. Bishop, 135.*

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3. Denial of contract in writing—manner of invoking statutory rule.—The statutory rule, that the defendant admits the execution of a contract in writing, upon which the action is founded, by failing to deny it under oath when he is charged therewith, cannot be invoked for the first time in this court; to be available, it must be urged in the trial court as ground of objection to the introduction of evidence controverting the execution of the contract. *Handley v. Railroad, 499.*

4. General denial, effect of.—Under the general issue, evidence may be received, which tends to show a cause of action never existed, or that it was void *ab initio*. Accordingly, when a petition alleges a lawful trust in favor of the plaintiff and seeks to enforce it in equity, it may be shown under a general denial that the trust was made for fraudulent purposes. *Scudder v. Atwood, 512.*

5. ———. The defense that personal injuries sued for were caused by the negligence of a fellow servant of the plaintiff, is available in an action by a servant against his master without being specially pleaded. *Sheehan v. Prosser, 569.*

6. Recovery on cause of action not pleaded.—A plaintiff must must recover, if at all, on the cause of action stated in his petition. Accordingly, when the petition alleges one contract and its breach, and the answer denies these allegations and states another and wholly different contract, an instruction which authorizes a recovery for the breach of the latter contract is erroneous. *Whipple v. Building and Loan Ass'n, 554.*

7. Malicious attachment—pleading—aider by verdict.—The petition in an action for malicious attachment must allege either that the attachment proceeding has terminated in favor of the attachment defendant, or that it has terminated against him and that he had no opportunity to defend against it; nor is the want of such allegation cured by verdict. *Freymark v. McKinney Bread Co., 435.*

8. Replevin—general denial—return of property.—When in replevin the answer is merely a general denial, and the property has been turned over to the plaintiff, and the finding is for the defendant, the pleadings will not sustain a judgment ordering a return of the property, or a money judgment for its assessed value. *Fowler v. Carr, 145.*

PRACTICE, APPELLATE.

1. What is open to review—preserving objections.—Objection and exception must be preserved in the bill of exceptions to warrant the consideration of objections to admission of evidence in the appellate court. *Pearson v. Gillett, 312.*

2. Same.—Objections to the admission of evidence cannot be noticed on appeal, unless exceptions are saved. *Wm. W. Kendall, etc., Co. v. Bain, 264.*

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3. Review of matters not covered by motion for new trial. Errors not referred to in the motion for new trial will not be considered on appeal. *McManus v. Watkins, 92.*

4. Failure of transcript to show purport of rejected evidence of appellant.—The court cannot review a ruling of the trial court in excluding a writing offered in evidence by the appellant, when the writing is not embodied in the transcript, and its effect is, therefore, not disclosed. *Schreiner, Flack & Co. v. Orr, 406.*

5. Examination of voluminous evidence.—An appellant is not entitled to the examination of voluminous evidence by this court, when he himself makes no statement of it and lends no assistance thereto. *Paxson v. St. Louis Drayage Co., 566.*

6. Disposition of cause on theory of trial.—The appellant must abide by the case he presents to the trial court, and stand in the appellate court upon the theory he presents below. *Quərbach v. Arnold, 286.*

7. Objections not raised in trial court—denial of contract in writing—manner of invoking statutory rule.—The statutory rule, that the defendant admits the execution of a contract in writing, upon which the action is founded, by failing to deny it under oath when he is charged therewith, cannot be invoked for the first time in this court; to be available it must be urged in the trial court as ground of objection to the introduction of evidence controverting the execution of the contract. *Handley v. Railroad, 499.*

8. Abstract, sufficiency of.—Although appellant's abstract does not contain the affidavit for an attachment filed with the justice, yet, as the justice's transcript states one was filed, and defendant's plea in abatement in the circuit court denies the allegations of the affidavit, the contention that the affidavit was not filed to authorize the attachment must be *held* unfounded. *Pearson v. Gillett, 312.*

9. De minimis non curat lex.—A judgment will not be reversed for error in a trifling amount—in this cause $1.89. *Paxson v. St. Louis Drayage Co., 566.*

10. Presumptions—finding of trial court on different counts. The appellate court will not interfere with the judgment below, on the ground that the trial court did not make a separate finding on each count, where the record fails to show affirmatively that the court did not pass on the merits of each count separately. *Chorn v. Missouri, Kansas & Texas R'y Co., 163.*

11. Harmless error.—Instructing the jury that the law restraining swine was in force in the county where the injury occurred, is harmless, and not reversible error. *Dilly v. Railroad, 123.*

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12. WAIVER OF DEMURRER TO EVIDENCE. An instruction of nonsuit was offered and refused at the close of the plaintiff's evidence, and thereon renewed at the close of the case. *Held* that, in review of these rulings, the entire evidence should be considered. *Storck v. Mesker, 26.*

13. EVIDENCE—REASONABLE INFERENCE.—In considering the sufficiency of evidence to go to the jury, the appellate court must allow it the weight which every reasonable inference can properly give it. *Dilly v. Railroad, 123.*

14. WEIGHING THE EVIDENCE. This court will not weigh the evidence in an action at law, when there is a substantial conflict in it. *Rainwater v. Burr, 468; Smith v. Carondelet, etc., Power Co., 559; Chorn v. Railroad, 163; Harding v. Manard, 364.*

15. ———. When the solution of an issue of fact in an action at law depends upon the credibility of witnesses whose testimony is conflicting, this court will not review the verdict of the jury thereon on the ground that it is opposed to the weight of the evidence. *Rich v. Fendler, 236.*

16. TRIAL BEFORE COURT—SUFFICIENCY OF EVIDENCE.—Where the trial was before the court without instructions and the evidence supports the finding, the appellate court will presume the trial court entertained a correct view of the law, and not disturb the judgment. *Pearson v. Gillett, 312.*

17. TRIAL BEFORE COURT—RULINGS ON EVIDENCE.—The same rigid rules in regard to the admission and exclusion of evidence ought not to be enforced in a trial before the court, as before a jury, for it is not to be presumed that the court would, in its deliberation and judgment, be influenced by evidence that might probably mislead a jury. *Hellman & Co. v. Bick, garnishee, 168.*

18. ——— SUFFICIENCY OF INSTRUCTIONS.—In a trial before the court, the same strictness is not required in the instructions as is demanded before a jury. *Trorlicht, Dunker & Renard Carpet Co., v. Hatton, 320.*

19. SAME.—A judgment will not be reversed because the trial court, sitting as a jury, fails to declare the law as fully as it might have done; especially so, when the instructions given announce correct rules of law applicable to the facts, and the whole evidence justifies the finding. *Myers v. Miller, 338.*

20. OFFICE OF INSTRUCTIONS IN TRIAL BEFORE COURT.—In trials before the court instructions are unimportant, save as showing upon what theory the court arrived at the result. *Price v. Merritt, 640.*

21. JUDGMENT ON AGREED STATEMENT OF FACTS.—When a cause is submitted to the trial court on an agreed statement of facts, and the proper judgment thereon is a mere conclusion of law, it is the

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duty of this court to render such judgment as the trial court should have rendered, if that of the trial court is found erroneous. *Burris v. Shrewsbury Park, etc., Co., 381.*

22. MECHANICS' LIENS—REVERSAL OF ENTIRE JUDGMENT.—The plaintiff herein, who was a surety on the bond of a contractor for a building, sued to enforce a mechanic's lien for work done on the building, and recovered judgment. The defendant owner recovered judgment on a counterclaim based on the bond. *Held,* on appeal by the plaintiff, that error in the trial of the counterclaim should work a reversal of both judgments. *Killoren v. Meehan, 487.* See also *Carthage Marble and White Lime Co. v. Bauman, 204.*

23. COSTS.—As defendant was compelled to appeal to be relieved of the error in assessing a fee for plaintiff's attorney, the docket fee is taxed against the respondent. *Dilly v. Railroad, 123.*

PRACTICE TRIAL. See INSTRUCTIONS, LAW AND FACT, AND PLEADING.

1. FILING OF PAPERS.—The filing of a paper—in this cause the contract sued upon—is its actual delivery to the officer whose duty it is to file it. The filing need not be shown by a file mark. *Collins v. Kammann, 464.*

2. SUIT ON PROMISSORY NOTE—APPEAL FROM JUSTICE—ELECTION OF THEORY OF ACTION.—When suit on a promisory note is brought before a justice of the peace against one whose name is written on the back of the note above that of the payee, the plaintiff may be required to elect in the circuit court on appeal, if he has not done so theretofore, in what capacity he seeks to charge the defendant—whether as joint maker, indorser, surety or guarantor—and is bound by his election, when made. *Barnett v. Nolte, 184.*

3. FAILURE OF PROOF—NON EST FACTUM.—Where the answer in an action on a written instrument presents the issue of *non est factum,* and there is no evidence tending to prove the signature, and the paper itself is not offered, there can be no recovery. *Cox v. Bishop, 135.*

4. STIPULATION—ABIDING RESULT.—It was stipulated that this case should abide the result of F. case appealed to the supreme court, provided that case was determined on its merits. F. case was determined on its merits, though no point was made on a question of interest. *Held,* this case cannot farther be prosecuted on the question of interest, which might have been settled in F. case. *City of St. Joseph ex rel. Gibson v. Hax, 293.*

5. INSUFFICIENCY OF OBJECTION TO EVIDENCE.—Objection to the admission in evidence of a letter as a whole is insufficient, when a portion of it is competent. *Grimm v. Dundee Land and Investment Co., 457.*

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6. Motion for new trial—objections to instructions.—Exceptions to instructions given by the court need not be taken specifically; a general exception addressed to the instructions in the aggregate will suffice. *Whipple v. Building and Loan Ass'n, 554.*

7. Reopening case.—It is proper for the trial court to permit the reopening of the evidence when once closed, if the ends of justice at the time appear to require it. *Pearson v. Gillett, 312.*

8. Instruction given orally and in absence of counsel.—It is error for the trial court, after the submission of a cause to the jury, to give to them an additional instruction orally or in the absence of counsel whose attendance can be procured. *Skinner v. Stifel,* 9.

9. Comment by court on character of the cause.—It is objectionable for the court in an instruction to the jury to state that it considers the cause a very simple one both as to the law and the facts, and to urge the jury to come to some agreement, owing to the small amount of money involved. *Ib.*

10. Instructions.—For rulings on office and effect of instructions in cases tried by the court sitting as a jury, see Practice, Appellate, 16 to 18.

11. Attorney's closing argument.—In an action for delay in sending a telegram, the sole question submitted to the jury was whether the preoccupied condition of the wires was the cause of the delay. The plaintiff's counsel in his closing argument told the jury he was an operator and had worked on the line in question, and it was all nonsense to say that any office could not be reached in twenty minutes. Defendant's counsel objected and called the court's attention to the matter, and excepted because the court made no ruling but permitted the plaintiff's counsel to proceed with further matter of the same kind. At the close of the argument defendant's counsel further objected and asked that the jury be discharged and the cause continued. The court thereupon told the jury not to consider statements of counsel concerning his personal knowledge as an operator, as he was not a witness in the cause; and defendant again excepted. *Held,* the conduct of the paintiff's counsel was prejudicial to the defendant, and the direction of the court to the jury was insufficient to cure the same, and the judgment should be reversed and a new trial granted. *Smith v. Western Union Tel. Co., 626.*

12. Motion in arrest of judgment—railroads—attorney's fee. The attorney's fee allowed by the statute in an action against a railway company for killing stock, is an issue of fact for the jury, which cannot be waived, except by written consent, or oral consent, in open court entered on the minutes, and advantage can be taken of the failure to submit it to a jury by motion in arrest, though no objection be made except in such motion. *Dilly v. Omaha & St. Louis R'y Co., 123.*

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13. Determination by special judge of motion for new trial of cause tried before the regular judge.—A special judge appointed under the act of 1891 has the power to act on a motion for the new trial of a cause tried before the regular judge, and to sustain it for the reason that under the circumstances he cannot dispose of it upon its merits. A mere protest against his hearing of the motion will, therefore, not render his action in this regard erroneous; but whether it would have been so, had the objection been supported by affidavits, showing a likelihood of an early return of the regular judge to the bench, is not decided. *Bremen Bank v. Umrath, 43.*

14. Motion for new trial—effect, when not filed by all of the defendants against whom judgment was rendered.—When all of the defendants against whom a judgment was rendered do not join in a motion for new trial, and their liability is several and not dependent upon the same conditions, as where it is against one as the maker and others as the indorsers of a note and the former does not join in it, it is error to sustain the motion as to all of the defendants. *Ib.*

15. ——— newly discovered evidence.—*Held, arguendo,* that a new trial on the ground of newly discovered evidence is not warranted, when such evidence ought not to change the result upon a retrial. *Terry v. Greer, 507.*

16. Mechanics' liens—entirety of judgment—effect of appeal. The judgment in an action by a subcontractor to enforce a mechanic's lien is an entirety. Accordingly, when in the trial court it is against both the original contractor personally and the claim of lien, the reversal of it by this court on appeal by the plaintiff vacates it altogether, and necessitates a retrial of the cause in both respects. *Carthage Marble and White Lime Co. v. Bauman, 204.*

PRINCIPAL AND AGENT. See Insurance (Fire), 4.

Application of proceeds of the sale of realty.—The plaintiff through his agent authorized the defendants to sell certain real estate for him. The sale was made, and the proceeds paid to this agent, excepting that a portion of them was applied to the satisfaction of a forged deed of trust on the realty which this agent had executed prior to his employment, and of the existence of which the plaintiff was ignorant. *Held,* that the plaintiff was entitled to recover from the defendant the amount thus applied. *Kelly v. Gay,* 39.

PRINCIPAL AND SURETY. See Bonds.

1. Building contract—discharge of surety of contractor. When a building contract provides against any material variation from its terms, unless the difference in the contract price resulting



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from the variation be first agreed upon by the parties in writing, and a material change in the work is agreed upon between the parties but not in writing, the surety of one of them will be discharged from further obligation, if he has not consented thereto. *Killoren v Meehan, 427.*

2. SAME.—But the surety will not be discharged by a change in the work contracted for, which was rendered necessary solely by the negligence of his principal in the execution of the contract; nor by an independent contract made after the completion and acceptance of the work with respect to which he has bound himself. *Ib.*

3. DISCHARGE OF SURETY.—If the holder of a judgment releases a lien obtained under it on property of the judgment debtor, the sureties on a bond of the latter, given for the payment of the judgment, are thereby discharged to the extent of the value of the property released. *Green v. Dougherty, 217.*

4. ALTERATION OF INSTRUMENT—SEAL—DISCHARGE.—Changing a simple contract to a specialty by adding the word "seal" in a scrawl after the names of the obligors is such alteration of the instrument as to discharge the surety. The authorities are discussed and distinguished, and the holding reaffirmed on motion for a rehearing. *Fred Heim Brewing Co. v. Hazen, 277.*

5. DISCHARGE OF SURETY.—If the payee causes the surety to forego security when he would have taken it, the surety is released without regard to the care or negligence exercised by the payee. *First Nat. Bank v. Lillard, 675.*

6. ———. The act of the payee that discharges the surety must be one that causes the surety to forego an indemnity he would have taken, and there should be evidence that he would have taken such security but for the act of the payee. *Ib.*

7. STRICT CONSTRUCTION.—The obligations of sureties are to be strictly construed, and their liabilities are not to be extended by implication; and a statute prescribing their liabilities must be strictly construed. *Erath & Flynn v. Allen & Son, 107.*

8. SUBROGATION.—A subcontractor who has paid wages to laborers cannot be subrogated to the rights of such laborers so as to maintain an action on the bond against the sureties thereon, as the statute confers a mere personal privilege or right upon the laborers, which is in no sense assignable. *Ib.*

9. CONSTRUCTION—NEBRASKA STATUTE PROVIDING BOND FOR MECHANICS, ETC.—SUBCONTRACTOR. The Nebraska statute requiring county boards to take from contractors erecting public buildings a bond for "the payment of all laborers and mechanics for their labor, etc.," does not include subcontractors, and an action cannot be maintained against the sureties on such bond by a subcontractor for a balance due him from the principal contractor for material furnished and wages paid to laborers. *Ib.*

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10. SUBROGATION—PARTIAL PAYMENT BY SURETY.—So long as a debt has not been entirely paid, the partial payment of it by a surety will not entitle him, by way of subrogation, to any of the collaterals in the hands of the creditor by which it is secured. *Ames v. Huse, 422.*

PROMISSORY NOTES. See NEGOTIABLE PAPER, 1 and 2.

PROSECUTING ATTORNEY. See CRIMINAL LAW, 9.

PUBLICATION. See JURISDICTION, 1 and 2.

QUIET TITLE, ACTION TO.

STATUTORY ACTION TO QUIET TITLE—WHEN IT LIES.—The plaintiff in a proceeding under section 2092 of the Revised Statutes to compel the defendant to bring an action to try the title to land is entitled to the statutory relief sought, when he is in possession of the land claiming the fee, and the defendant claims an adverse and immediate interest in the property, which is capable of being at once tested by appropriate proceedings in the courts; the form of the action in which such title or adverse interest is to be asserted is not material. *Cook v. Von Phul, 487.*

RAILROADS. See COMMON CARRIERS; also NEGLIGENCE, 11 to 14.

1. FENCING STATION GROUND.—Whether a railroad company has placed its fence and cattle guards as near the head of its switch as is consistent with the safety of trainmen in switching trains at the station is a question for the jury under proper instructions. *Welsh v. Railroad, 599.*

2. KILLING STOCK—NOTICE.—An instruction, if a gate was left standing open for such length of time directly previous to the accident, the defendant knew, or could by the exercise of ordinary care have discovered, it in time to have closed it before stock killed passed through it, then the defendant is liable, is supported by the evidence in this case, as is also an instruction summarized in the opinion which was given for the defendant. *Nicholson v. Railroad, 593.*

3. ——— CIRCUMSTANTIAL EVIDENCE.—If the triers of the facts can with reasonable certainty infer from the surrounding circumstances that the stock was killed in the manner charged, then the appellate court is not authorized to interfere. *Chorn v. Railroad, 163.*

4. DAMAGE BY STOCK—FENCE.—The statute makes it the duty of a railroad to so fence its track that stock cannot enter upon its track, or, being there, cannot escape on the adjoining fields and commit damage; and this applies to tenants as well as to owner of the fee. *Langkop v. Railroad, 611.*

5. ——— ——— CORNERING TRACTS.—Plaintiffs were tenants of a triangular piece of land adjoining defendant's right of way, which was in a common enclosure with a cornering eighty owned by them

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in fee, and a passage could not be effected from one tract to another without passing over another triangular piece belonging to another cornering tract, which latter triangular piece plaintiffs had enclosed in a lane connecting these two tracts, without the apparent consent of the owner, and so kept it enclosed for two years; *held*, such owner at least acquiesced in the use of his land by plaintiffs, and defendant was not relieved of its duty to fence its track, and, failing to do so, is liable for damage done on the land owned by plaintiffs in fee, by hogs escaping from its right of way over the two triangular pieces. *Ib.*

6. KILLING STOCK—EVIDENCE.—*Held*, the reasonable inference to be drawn from all the evidence in the case, was that the injury to plaintiff's stock occurred in Benton township. *Dilly v. Railroad, 123.*

7. ——— ATTORNEYS' FEE—MOTION IN ARREST. The attorney's fee allowed by the statute is an issue of fact for the jury, which cannot be waived, except by written consent, or oral consent in open court entered on the minutes, and advantage can be taken of the failure to submit it to a jury by motion in arrest, though no objection be made, except in such motion. *Ib.*

REPLEVIN.

1. RIGHT OF SUCCESSFUL PARTY TO HOLD THE OTHER FOR CONVERSION PENDING THE PROCEEDING.—The defendant in an action of replevin retained the property in controversy by giving a forthcoming bond. The judgment in the action was in favor of the plaintiff, and gave him an election to take the property or its assessed value. The defendant, nevertheless, sold the property without affording the plaintiff any opportunity to take it under the judgment. *Held*, that the defendant was guilty of a conversion of the property, and that he was, therefore, answerable for its actual value at the time of the sale in a new action by the plaintiff on that theory. *Hanlon v. O'Keefe, 528.*

2. ELECTION BY SUCCESSFUL PARTY.—The fact that an execution was issued under the judgment in the action of replevin, and that the defendant paid to the sheriff the value of the property assessed in that action, does not establish an election by the plaintiff under that judgment; accordingly, the plaintiff having refused to accept the collection from the sheriff, his right to the property remained unimpaired. *Ib.*

3. GENERAL DENIAL—RETURN OF PROPERTY.—When in replevin the answer is merely a general denial, and the property has been turned over to the plaintiff, and the finding is for the defendant, the pleadings will not sustain a judgment ordering a return of the property, or a money judgment for its assessed value. *Fowler v. Carr, 145.*

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RES ADJUDICATA. See JUDGMENTS, 3 and 4.

REVENUE. See TAXES, 1 to 3.

SALES. See FRAUDS, STATUTE OF, 1.

1. GAMBLING CONTRACTS—SALES OF GRAIN ON MARGINS WITHOUT INTENT TO DELIVER.—Since the act of 1889 (Revised Statutes, 1889, sec. 3931, *et seq.)* contracts for the sale of grain are void, if one of the parties thereto does not intend to receive or deliver the commodity sold, and the other party is aware of his intent—whether he shares in it or not. That statute also affects middlemen. *Schreiner, Flack & Co. v. Orr, 406.*

2. ——— EVIDENCE OF INTENT NOT TO RECEIVE OR DELIVER.—The intent of a party to the contract, that there shall be no delivery of the commodity, may be gathered from all the attending circumstances. And *held*, that the evidence in this cause warranted the inference. *Ib.*

3. ——— INSTRUCTIONS.—Instructions relating to a sale of hogs, presenting the issue of a wagering contract, are set out and approved. *Harding v. Manard, 364.*

4. DELIVERY OF POSSESSION.—If the vendor agrees to transfer the absolute property in the thing to the vendee for a money price, the contract is complete and binding, the vendee is entitled to the specific chattel and the vendor to the price; and no actual, manual delivery of possession is necessary. *Ib.*

5. ——— BAILEE.—When the goods are in the possession of a bailee, an absolute sale confers an immediate and valid title upon the purchaser without any formal delivery of possession; and the bailee's possession becomes the purchaser's possession. *Ib.*

6. RESCISSION OF SALE—TENDER, WHEN UNNECESSARY.—A tender need not be shown, when it conclusively appears that it would have been fruitless, if made. *Enterprise Soap Works v. Sayers, 15.*

7. ——— RECOVERY OF PURCHASE MONEY—MEASURE OF RECOVERY. A vendee of merchandise, after payment of the purchase money, duly rescinded the sale. Subsequently he caused this merchandise to be attached in a suit against the vendor in a foreign jurisdiction for the recovery of this purchase money, and to be sold under a judgment *in rem* recovered by him therein. Later, still, he sued the vendor *in personam* for the purchase money. *Held*, in the latter suit, that the vendor was entitled to credit only for the net proceeds of the sale under the judgment *in rem*, and not for the reasonable value of the merchandise sold. *Ib.*

8. WARRANTY—RESCISSION—REASONABLE TIME—JURY QUESTION.—The vendee of a chattel mortgage on breach of warranty may rescind the contract and recover back the purchase price, yet, he must act within a reasonable time, which is ordinarily a question for the

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jury; but where, as in this case, the delay is without excuse or fair explanation, the courts will, as a matter of law, declare the same unreasonable. *Viertel v. Smith, 617.*

9. WARRANTY—COMMENDATIONS—INTENTION—JURY QUESTION.—Mere assertions of the quality or condition of a chattel at the time of a sale is not, as matter of law, a warranty, but is merely evidence thereof, as it may tend to show the intention of the parties, which is a question for the jury. *Ransberger v. Ing, 621.*

10. ——— ADVERTISEMENT OF AUCTION.—The statement in the posted notice of an auction sale, that certain "shoats were in good health and condition," is not a warranty of their condition at the time of the sale; as a warranty, though called a collateral undertaking, yet forms a part of the contract by agreement of the parties at the time of sale. *Ib.*

11. WARRANTY OF CAPACITY OF MACHINE—EVIDENCE.—An action on the warranty of a machine will not be defeated by a paper signed after the sale, stating that the machine was working satisfactorily, and such paper does not estop the warrantee from the setting up of a breach of warranty, and testifying to matters inconsistent with such paper; nor will such paper be excluded in this case, because it prevented plaintiff from claiming back from the machine company, nor because it was an injury to plaintiff to have the admission in the report disproved. *McManus v. Watkins, 92.*

SLEEPING CAR COMPANIES. See NEGLIGENCE, 14.

STATUTES. See LAWS; also SUNDAY, 2.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

SUBROGATION. See PRINCIPAL AND SURETY, 8 and 10.

SUNDAY.

1. VALIDITY AT COMMON LAW OF CONTRACT FOR WORK ON SUNDAY.—A contract for work and the transaction of business on a Sunday is not invalid at common law. *Said v. Stromberg, 438.*

2. CONTRACTS, VALIDITY OF—EXTRA-TERRITORIAL EFFECT OF SUNDAY LAWS.—Our statutes against the performance of labor on Sunday have no extra-territorial effect, and therefore, do not invalidate a contract which is made in this state but is wholly to be performed beyond its limits. *Ib.*

TAXES.

1. BOARD OF EQUALIZATION—RECORD—CLERK'S ASSISTANCE—CORRECTING MISTAKES.—A mere assistant to the secretary of the boad of equalization has no authority to make the record of the board, and his attempt to do so is a mere mutilation, unless made under the secretary's direction; and if made under such direction, the secretary, upon discovering mistakes immediately thereafter, may correct any error and make it conform to the truth. *State ex rel. v. Wray, 646.*

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2. ——— CORPORATE ACTION.—While the persons composing the board of equalization, convened and acting in their official capacity, may exercise the powers conferred upon that board, still these same persons, when not so convened and when not acting as an organized body, but individually, have no authority to exercise these powers, even though all should severally concur in what is done. *Ib.*

3. ——— APPROVAL OF RECORD.—The statute does not require the approval of its record by the board of equalization, and the absence thereof cannot impair the record's legal effect; and if the board were required to sign the record, the failure to do so would not invalidate it. *Ib.*

TAXES, SPECIAL. See MUNICIPAL CORPORATIONS, 1 and 2

TENDER. See SALES, 4.

TROVER.

1. RIGHT OF ACTION BY MORTGAGEE.—An action of trover cannot be maintained by one who has neither the right of property in the chattel alleged to have been converted, nor the right of possession; and neither of said rights follows from the mere fact that the plaintiff is a mortgagee of the chattel before condition broken. *Bank of Little Rock v. Fisher, 51.*

2. REPLEVIN—RIGHT OF SUCCESSFUL PARTY TO HOLD THE OTHER FOR CONVERSION PENDING THE PROCEEDING.—The defendant in an action of replevin retained the property in controversy by giving a forthcoming bond. The judgment in the action was in favor of the plaintiff and gave him an election to take the property or its assessed value. The defendant, nevertheless, sold the property without affording the plaintiff any opportunity to take it under the judgment. *Held*, that the defendant was guilty of a conversion of the property, and that he was, therefore, answerable for its actual value at the time of the sale in a new action by the plaintiff on that theory. *Hanlon v. O'Keefe, 528.*

TRUSTS. See EQUITY, 2 and 3.

USURY. See INTEREST.

WITNESSES.

1. NEGLIGENCE IN OVERDRIVING—EXPERT EVIDENCE.—The plaintiff sued herein for the death of a horse alleged to have been caused by overdriving. He sought to establish this allegation by the opinion of an expert, and with that purpose put to the expert a hypothetical case, which substantially covered the facts shown in evidence, with the exception of the speed at which the horse was driven. *Held*, that this omission rendered the hypothetical case objectionable. *Marshall Livery Co. v. McKelvy, 240.*

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2. INSTRUCTION—WITNESS SWEARING FALSELY—MATERIAL FACT.—An instruction telling the jury that, if they believe any witness has willfully sworn falsely, they are at liberty to disregard the whole of his testimony, is fatally faulty in not confining the false swearing to a material fact. *White v. Lowenberg, 69.*

3. SAME.—Instructions calling attention to the veracity of witnesses are not favored by the courts, and the propriety and necessity of giving them is left largely with the discretion of the trial courts; when given they should be drawn so as to confine their application to material facts. *Ib.*

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# RULES GOVERNING PRACTICE

IN THE

# KANSAS CITY COURT OF APPEALS.

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*It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:*

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-fonr hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;*" and if any pleading be

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amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called by for bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where

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the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

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RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

*Attest:*

L. F. MCCOY, *Clerk.*

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# RULES OF PRACTICE

OF THE

# ST. LOUIS COURT OF APPEALS.

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*REVISED OCTOBER 17, 1888.*

*TO BE IN FORCE NOVEMBER 1, 1888.*

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RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE.—Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not *(unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause)*, in making out transcripts of the record for this Court, set out

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the original or any subsequent writ, or the return thereof; but in lieu thereof shall say *(e. g.): "Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;"* and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time. [*To be in force from and after October 20, 1891.*]

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes, 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. [*To be in force from and after October 20, 1891.*)

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts

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shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before before the day on which the cause is called for hearing, and the respondent, or defendant in error, shall at least five days before the cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk, at least one day before the case is called for hearing. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing.

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the

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court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case, without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

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Rule 25.—Appearance of Counsel. The Counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days, before the first day of the term to which the appeal or writ of error is returnable; and, if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the Clerk of this Court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

**The following additional rules were adopted to take effect December 19, 1893:**

Rule 26.—In view of the rulings of the Supreme Court, confining the jurisdiction of this Court in issuing original remedial writs to such cases wherein it has appellate jurisdiction, it is ordered: No original remedial writs, excepting such as are in aid of the appellate jurisdiction of this Court and excepting also writs of Habeas Corpus and Prohibition, will hereafter be issued by this Court or any of the Judges thereof, except in cases where the application for such writs cannot be effectually presented to the Circuit Court or the Supreme Court, or some Judge thereof. Nor will any writ of Prohibition be issued unless by order of a majority of the Judges, nor in any case whereof the Supreme Court has appellate jurisdiction.

Rule 27.—Garnishees claiming any allowance in this Court must do so on or before a final submission of the cause on briefs They shall accompany the claim for allowance with a sworn statement of expenditure paid or incurred upon the appeal.

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